

Volume 12

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Susan Illston, Judge

DONALD C. BRYAN, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	NO. CV 08-05221-SI
	)	
WAL-MART STORES, INC.,	)	
	)	
Defendant.	)	
_____	)	

San Francisco, California  
Wednesday, November 16, 2016

**TRANSCRIPT OF TRIAL PROCEEDINGS**

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## PROCEEDINGS

Wednesday - November 16, 2016

8:39 a.m.

P R O C E E D I N G S

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(Proceedings were heard out of presence of the jury:)

**THE CLERK:** Come to order.

**THE COURT:** Good morning. You may all be seated.

So you wanted to talk?

**MR. EDELMAN:** Yes, Your Honor.

**THE COURT:** Is it about this paper you filed?

**MR. EDELMAN:** Yes, Your Honor.

**THE COURT:** What is your response? What is the plaintiffs' response to the paper?

**MR. MYRICK:** Your Honor, these rebuttal witnesses are going to be called specifically to rebut testimony and evidence raised by the defendant's witnesses, specifically with regard to the activity codes paying for all these activities and policy on layover, the application of the policy, strictly those two issues.

**THE COURT:** All right. Well, I'm inclined to allow it.

**MR. EDELMAN:** You are --

**THE COURT:** Inclined to allow it. Your motion is denied.

**MR. EDELMAN:** Your Honor, I have two concerns.

One, I know you've already thought about and rejected --

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1           **THE COURT:** Well, I did read your paper which you  
2 filed.

3           **MR. EDELMAN:** Okay. And I would also call the Court's  
4 attention to our prior brief where we raised this issue when  
5 they were talking about recalling our prior five witnesses, but  
6 I -- because it's the same topic. In other words, these issues  
7 have been in the case throughout.

8           **THE COURT:** They have, but they've been certainly more  
9 clearly limbed now than they were before. So I think it's  
10 certainly fair that they call rebuttal witnesses on these  
11 points.

12           **MR. EDELMAN:** All right. Well, Your Honor --

13           **THE COURT:** Now, I don't know how much time anybody  
14 has. That's a different point.

15           **MR. EDELMAN:** That's the second part of my concern,  
16 which is --

17           **THE COURT:** Well, that's my concern; that's not your  
18 concern.

19           **MR. EDELMAN:** Well, let me tell you why it's my  
20 concern.

21           The reason it's my concern is because if they're going to  
22 call six witnesses -- and, you know, we believe that they're on  
23 topics that have already been addressed, but you've ruled on  
24 that -- but if they are going to call six witnesses now, even  
25 people who were on their witness list earlier, even people that

## PROCEEDINGS

1 they told us that they were going to call during their case and  
2 then they changed their mind and they've decided to wait and  
3 call them later, that puts us in a difficult situation because  
4 we don't have time to cross-examine --

5 **THE COURT:** They don't have time to examine six  
6 witnesses.

7 **MR. EDELMAN:** Well, but, I mean, you know, I can't put  
8 myself in the position -- what it means is that I'm not going  
9 to be able to read the deposition testimony that we had planned  
10 to read because I can't --

11 **THE COURT:** Well, then let me tell you the quiet rule  
12 which exists in any courtroom -- well, at least in my  
13 courtroom, which imposes time limits. My quiet rule is this,  
14 because lawyers do sometimes run out of time.

15 You've got five minutes to cross-examine if you've run out  
16 of time and somebody else puts on a witness. It's not much,  
17 but it's probably more than they have to examine.

18 So for either of you, if you run out of time, you've got  
19 five minutes to cross-examine some witness the other person  
20 puts on.

21 Is that clear?

22 **MR. EDELMAN:** Okay. Thank you, Your Honor.

23 **MR. MYRICK:** Thank you, Your Honor.

24 **THE COURT:** Are we ready? Do we have all the jurors?

25 **THE CLERK:** I don't think so.

## PROCEEDINGS

1           **THE COURT:** Incidentally, the five-minute rule is if  
2 the other guy puts somebody up on his own time, you've got five  
3 minutes. It does not mean you've got five extra minutes to  
4 call all the witnesses you would like to call on rebuttal if  
5 you've run out of time.

6           Is that clear?

7           **MR. MYRICK:** I understand, Your Honor.

8           **THE COURT:** Evidently we are missing one juror, so  
9 we'll have to wait.

10          **MR. SALTZMAN:** Your Honor, thank you for your  
11 graciousness yesterday in giving me your copy of this page, but  
12 I will give it back to you so you have a full set. Thank you.

13          **THE COURT:** Let's talk about instructions since we  
14 have some time.

15          I did consider, for one brief shining moment, ordering  
16 that you produce a joint set. It would be the third time I  
17 have ordered it. It would be the third time that I was  
18 disappointed, so I'm not going to do that again.

19          I think what we're going to do is make an effort to put  
20 together a set. I will try to get that to you tonight sometime  
21 so that when you come -- assuming we end today, that when you  
22 come tomorrow, you'll have at least something to start on and  
23 then we can talk about it.

24          We could -- I would suggest that we start like at 1:30  
25 tomorrow. Does that work for people?



## PROCEEDINGS

1           **MR. WAGNER:** Rather than the morning?

2           **THE COURT:** Would you prefer the morning?

3           **MR. WAGNER:** Right. Yes.

4           **MR. ARTENIAN:** Midmorning.

5           **MR. SALTZMAN:** Maybe 10:30.

6           **THE COURT:** Okay. 10:30. That would be fine.

7           **MR. WAGNER:** How many hours do you think, Judge, it's  
8 going to take?

9           **MR. SALTZMAN:** Five minutes of rebuttal time.

10          **THE COURT:** We will be done by noon.

11          **MR. WAGNER:** So about an hour and a half for jury  
12 instructions and verdict form?

13          **THE COURT:** Golly, I haven't looked at that yet.

14          **MR. WAGNER:** Okay.

15          **THE COURT:** Why do you ask?

16          **MR. WAGNER:** Well, just trying -- for timing for  
17 tomorrow.

18          **THE COURT:** Are you from out --

19          **MR. WAGNER:** Yes.

20          **THE COURT:** So you need an airplane?

21          **MR. WAGNER:** Yes.

22          **THE COURT:** Oh, okay. Well, I would think you'd be --  
23 what you should do at noon when we finish up here, you should  
24 all go to lunch together, drink some nice Napa wine, and settle  
25 the case.

## WALKER - CROSS / SALTZMAN

1 But assuming you don't do that, I would imagine that by  
2 midafternoon or late afternoon, you'd be ready to go home.

3 MR. WAGNER: Tomorrow?

4 THE COURT: Yes.

5 MR. SALTZMAN: Thank you, Your Honor.

6 MR. EDELMAN: So we will start at 10:30 tomorrow?

7 THE COURT: Yes.

8 (Proceedings were heard in the presence of the jury:)

9 THE COURT: All right. Mr. Saltzman -- oh, you better  
10 swear the witness again today.

11 JONATHAN WALKER,

12 called as a witness for the Defendant, having been duly sworn,  
13 testified as follows:

14 THE COURT: Mr. Saltzman.

15 MR. SALTZMAN: Thank you, Your Honor. I will try and  
16 be brief this morning.

17 CROSS-EXAMINATION (resumed)

18 BY MR. SALTZMAN:

19 Q. Dr. Walker, nice to see you again.

20 A. Good morning.

21 Q. I put up on the board a blowup we've been using throughout  
22 the trial. It has pretty close -- it has summaries or  
23 pretty -- summary language of the activity codes that Wal-Mart  
24 has issued.

25 Do you recognize -- do you see that board?

## WALKER - CROSS / SALTZMAN

1     **A.**     I do.

2     **Q.**     Is it close enough for you?  I see --

3     **A.**     I see --

4     **Q.**     -- you straining a little bit.

5     **A.**     -- most of it.

6     **Q.**     Let me see if I can move it a little bit closer.

7             **THE COURT:**  Well, you know, somebody could put it up  
8     on the screen.

9             **MR. EDELMAN:**  We can put it up on the screen.  Would  
10    that help?

11            **MR. SALTZMAN:**  That would be fine.

12            **MR. EDELMAN:**  Kim, could you do that, please?  Is that  
13    69 -- 619.  There we go.  Thank you very much.

14    **BY MR. SALTZMAN:**

15    **Q.**     It's on the screen in front of you to your left.

16    **A.**     Okay.

17    **Q.**     Do you recognize that as the various activities codes that  
18    Wal-Mart has published?

19    **A.**     I think so, yes.

20    **Q.**     And in your review of the documents and getting ready to  
21    testify in this case, you reviewed the -- am I correct you  
22    reviewed the three manuals, the 2001, 2006, and 2008?

23    **A.**     Yes.

24    **Q.**     Okay.  And it's your belief, if I'm correct, that the pay  
25    codes are actually not very well defined in the pay manuals; is

## WALKER - CROSS / SALTZMAN

1 that right?

2 **A.** They're not completely defined, that's right.

3 **Q.** I think actually you said "not very well defined" when you  
4 were deposed.

5 Do you recall that?

6 **A.** I may have.

7 **Q.** Okay. Do you know who drafted these activity codes? As  
8 between Wal-Mart and the drivers in the class, do you know who  
9 drafted these activity codes?

10 **A.** Wal-Mart employees.

11 **Q.** Wal-Mart -- not the drivers, though. Wal-Mart corporate;  
12 right?

13 **A.** Yes.

14 **Q.** Okay. Did you read the testimony -- you said you read a  
15 lot of testimony for the trial.

16 Did you read Ms. Ann Wilson Dyer's testimony?

17 **A.** I did.

18 **Q.** Did you see where she testified that in 2006, before  
19 issuing the 2006 manuals, the company set about trying to  
20 clarify its pay manuals and pay codes specifically? Did you  
21 see that?

22 **A.** I don't recall exactly what she said. I know there was a  
23 revision.

24 **Q.** I'm sorry. You know there was what?

25 **A.** I know they revised it, and I would assume that it's to

1 make it clearer.

2 Q. Okay. So Wal-Mart, in 2006, had the opportunity -- in  
3 fact, took upon itself to try and make them more clear;  
4 correct?

5 A. In some respects, yes.

6 Q. And what's up on the board in front of you is the result  
7 of -- because these were -- this was 2006 and 2008 on the board  
8 included -- that's what they came up with after doing their  
9 clarification; correct?

10 A. I don't know. Maybe. I mean, I don't remember exactly  
11 where -- which manual each language -- all the language comes  
12 from. But --

13 Q. Okay.

14 A. -- I don't deny it; I just don't know. I don't dispute  
15 it.

16 Q. Okay. But whatever it is, you believe that they were not  
17 very well defined.

18 A. They were not completely defined, no, that's right.

19 Q. Let me move that. I have left up on the board -- we can  
20 close that one down. Thank you.

21 I've left up on the board a chart that counsel put in  
22 yesterday when you were being examined.

23 One of the issues that you were concerned about in the  
24 questionnaires was people being affected by unconscious  
25 influences; correct?

1       **A.**     Yes.

2       **Q.**     And I took notes while you were talking yesterday, and one  
3       of the unconscious influences you were concerned about was  
4       social desirability.

5             Do you remember that?

6       **A.**     Yes.

7       **Q.**     The example you gave was, for example, washing the truck  
8       somewhat of a -- is a courtesy to a driver who is coming after  
9       you, and, therefore, it's -- how does that create some kind of  
10      unconscious influence?

11      **A.**     That may be perceived as something that people are  
12      supposed to do, that the people answering the question may  
13      perceive that it's better if you're somebody that regularly  
14      washes your truck and takes care of the other guy.

15      **Q.**     You're aware that the Wal-Mart manual requires the drivers  
16      to wash the tractor every week?

17      **A.**     I know that there's language saying, "Wash your tractor  
18      once a week," yes.

19      **Q.**     Okay. So in this case, whether it's courteous or not to  
20      do that, in fact, it's required by Wal-Mart; right?

21             **MR. EDELMAN:** Objection. Misstates evidence.

22             **THE WITNESS:** I read testimony that said no. I know  
23      that the -- the manual says, "Wash your truck once a week," but  
24      I also read the trial testimony where people who were managers  
25      said no.

1           So I don't know. I'm not an expert on those sorts of  
2 things.

3 **BY MR. SALTZMAN:**

4 **Q.** Right. The managers.

5           Okay. What about the pre-trip? You said that pre-trips  
6 and post-trips, which are safety issues, would be socially  
7 desirable because it's, what, polite to take care of safety  
8 issues?

9 **A.** That -- again, that it's something that's -- that may be  
10 perceived as something that it's good to do because it's more  
11 safe.

12 **Q.** And, again, kind of the same question. I think we've  
13 covered it, but this -- something that's nice to do, socially  
14 desirable, it's required by law and by the Department of  
15 Transport and it's required by Wal-Mart, correct, pre-trips and  
16 post-trips?

17 **A.** Yes. It's my understanding that those are required, but  
18 my testimony had to do with whether people will remember that  
19 they did it -- the frequency at which they remember doing it,  
20 not whether it's required or not.

21 **Q.** Okay. In terms of the social bias or the social  
22 desirability that might trigger an unconscious influence, I  
23 think you also talked about former employees perhaps being more  
24 inclined to, what, testify to longer durations.

25           Is that what you were saying yesterday?

1     **A.**    No, I didn't say that. I said that the former employ --  
2     that the group was not statistically representative, and that  
3     when you looked at what people said, former employees tended to  
4     say that things took longer and that they occurred more  
5     frequently and that Dr. Phillips' sample was overly weighted  
6     towards those employees. So that was a separate issue. It  
7     wasn't a social desirability bias.

8     **Q.**    I don't like to dwell on those that have passed from this  
9     earth, but you did talk about six people who were deceased;  
10    right?

11    **A.**    I think you asked me about the deceased people, yes, and I  
12    said that that also is potentially a source for statistical  
13    bias.

14    **Q.**    The people who were deceased, those were former employees;  
15    right?

16    **A.**    Yes.

17    **Q.**    So by having -- just kind of moving forward with this, by  
18    having six of the people removed from the pool who were  
19    deceased, those would be -- that would result in removing  
20    people that you believe would be more likely to testify in  
21    favor of the plaintiffs; is that right?

22    **A.**    I wasn't talking about the deceased being -- likely to  
23    testify in favor of the plaintiffs. I said that that would  
24    affect the statistical representativeness of the sample.

25    **Q.**    But those six people, by your other testimony, would be



1     apparently more -- some kind of unconscious influence to favor  
2     the plaintiffs, so, therefore, removing six people who were  
3     deceased would remove six people from potentially being in the  
4     pool who would be favorable towards the plaintiff, under your  
5     theory?

6     **A.**    I didn't say that the people who were former employees  
7     were more like -- were being subjected to unconscious biases  
8     which caused them to testify or to fill out the questionnaire.  
9     You said that.

10           What I had said was that they tended to answer the  
11     questions differently, for whatever reason. The two potential  
12     explanations are: One, their experiences tended to be  
13     different, which suggests that they shouldn't have been -- you  
14     shouldn't have looked at former employees and current employees  
15     and mish-mashed them together; or, secondly, they just had  
16     different recollections and that their recollections were  
17     biased.

18     **Q.**    Okay.

19     **A.**    But, you know, I wasn't talking about -- you're conflating  
20     two different things from the board when you're talking about  
21     the statistical representativeness and the unconscious biases.

22     **Q.**    Okay. With regard to current employees, have you reviewed  
23     any studies or any California cases, case law out of the  
24     California Supreme Court, for example, talking about the  
25     likelihood of current employees testifying -- or not wanting to

1 testify, first of all, against their current employers and  
2 feeling intimidated or inhibited when testifying against a  
3 current employer? Have you reviewed any Supreme Court law  
4 about that?

5 **MR. EDELMAN:** Objection, Your Honor.

6 **THE COURT:** So the question is has he reviewed Supreme  
7 Court law?

8 **MR. SALTZMAN:** I'll make it more -- that's the  
9 question, but I'll try and lay a better foundation to where I'm  
10 going.

11 **BY MR. SALTZMAN:**

12 **Q.** You review surveys and articles about what happens in  
13 litigation to understand surveying and proportional testimony.  
14 You read about that in the literature; correct?

15 **A.** I -- do I -- no, I don't look at court cases to understand  
16 surveys. I -- maybe you could repeat your question.

17 **Q.** Okay. In general, you read literature in the field;  
18 right?

19 **A.** Yes.

20 **Q.** Okay. And as an expert in this field, which is employment  
21 litigation, have you taken it upon yourself to actually stay  
22 current with the law regarding these issues, at least to know  
23 what it talks about? Not to be an expert in that, but to  
24 understand the law.

25 **MR. EDELMAN:** Objection.

## WALKER - CROSS / SALTZMAN

1           **THE COURT:** Sustained.

2           **BY MR. SALTZMAN:**

3           **Q.** Have you -- in your reading and literature you look at to  
4 try and be familiar with being able to testify on these issues,  
5 do you -- do you ever read cases of the law that governs these  
6 issues?

7           **MR. EDELMAN:** Same objection.

8           **THE COURT:** Well, that's yes or no. You may answer,  
9 sir.

10          **THE WITNESS:** Yes.

11          **BY MR. SALTZMAN:**

12          **Q.** So you do read some cases?

13          **A.** Yes.

14          **Q.** Okay. So my question is with regard to the specific issue  
15 of unconscious influences, have you read any California or  
16 Supreme Court cases dealing with the unconscious influence or  
17 effect on testimony on current employees of any cases that deal  
18 with that issue and that talk -- that talk about current  
19 employees feeling inhibited or intimidated?

20          **MR. EDELMAN:** Objection, Your Honor.

21          **THE COURT:** Overruled.

22          You can answer. That's yes or no.

23          **THE WITNESS:** I'm sorry. Could you just repeat it?  
24 I'm sorry. Reread it or --

25          **MR. SALTZMAN:** Kind of long-winded. I'll try and make

1 it shorter.

2 **BY MR. SALTZMAN:**

3 **Q.** And this is -- again, as the Court said, this is a yes or  
4 no question.

5 So have you read -- in trying to stay current -- and  
6 you've said you read some case law -- have you read any cases  
7 from the California Supreme Court that talk about the impact of  
8 a current employee being asked to testify in a case that is  
9 against his or her employer -- current employer?

10 **MR. EDELMAN:** Same objection, Your Honor.

11 **THE COURT:** Overruled.

12 You may answer, sir.

13 **THE WITNESS:** I don't recall -- I thought there was  
14 something about unconscious bias in there. I certainly don't  
15 recall any court cases, reading any of the talk about  
16 unconscious bias. I just don't recall it.

17 **BY MR. SALTZMAN:**

18 **Q.** Okay. So more spec -- a little broader, then.

19 In your -- in your reading and staying current in the  
20 area, have you read any cases, in the legal cases you have  
21 read, that talk about current employees feeling intimidated or  
22 inhibited in testifying against their current employer?

23 **MR. EDELMAN:** Objection, Your Honor.

24 **THE COURT:** You may answer. That's yes or no.

25 **THE WITNESS:** I don't recall that. It may have been

## WALKER - CROSS / SALTZMAN

1 in cases that I've read, but I don't recall it.

2 MR. SALTZMAN: Okay.

3 BY MR. SALTZMAN:

4 Q. I assume you're being paid for your time here and --

5 A. Yes, I am.

6 Q. -- and for your time in preparing to come here?

7 A. Yes, I am.

8 Q. And in doing all the studies you did, preparing to issue  
9 your reports that were done several months ago?

10 A. Yes.

11 Q. Okay. Can you tell us approximately how much your firm  
12 has been paid for its services in this case?

13 A. I don't know the number. It's -- the total bill is at  
14 least \$500,000, but I don't know the number.

15 Q. \$500,000?

16 A. Yes.

17 Q. Okay. And does that include any work you've done in the  
18 last month or so as you've gotten ready to come to court? Are  
19 those bills current, or is that in addition to whatever was  
20 billed earlier?

21 A. That was just a guess. I don't -- I don't know what the  
22 total cost has been --

23 Q. Well, none of us --

24 A. -- for any period of time.

25 I know that through today, I'm sure it's \$500,000, but I

1 don't know beyond that.

2 Q. So I don't want you to guess, but you're confident that's  
3 a fair estimate?

4 A. I'm confident that we've billed at least -- Economists  
5 Incorporated has billed at least \$500,000 for the work it's  
6 done in this case.

7 Q. You testified yesterday about what drivers had said at  
8 depositions regarding spending a portion of time away from  
9 their trucks during layovers.

10 Do you remember that?

11 A. Yes.

12 Q. In the percentages that you gave to the jury, did you --  
13 were you including anyone who testified that even once they had  
14 done that? You weren't attempting to -- for example, you  
15 weren't attempting to quantify how often that happened; it  
16 simply had to have happened once for them to fall into your  
17 categories?

18 A. Yes.

19 Q. Okay. So for all of the percentages you gave, if someone  
20 had spent one time away, that was included in your 60 or 70 or  
21 80 percent numbers you gave the jury?

22 A. Well, one of the numbers had to do with whether they  
23 perceived that they -- that they could if they wanted to  
24 without permission, and that's not how many times.

25 The -- there were counts -- the other counts, as I

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1 recall -- I don't have them right in front of me; I could look  
2 at them -- but, yeah, it was just, "Did you ever do this?"

3 Q. So one time -- one time, it put them in that group?

4 A. Yes.

5 Q. And, also, did you attempt to figure out whether any of  
6 the drivers in that group were what are called set run drivers?

7 Do you know what a set run driver is?

8 A. I do know what a set run driver is.

9 Q. Did you attempt to see whether any of those drivers were  
10 in the group you were looking at?

11 A. I'm sure that they were.

12 Q. Okay. And you understand that set run drivers don't have  
13 a sleeper berth in their tractor; right?

14 A. Yes. I understand that they always take their layovers at  
15 hotels and motels.

16 Q. Okay. So they were included in those numbers, as well?

17 A. Yes.

18 Q. And included in that number would have been, then, anyone  
19 who took a layover outside their tractor if, for example, they  
20 had an emergency situation that might have triggered discretion  
21 pay or something else, but as long as the layover was outside  
22 the -- outside the tractor, even once for an emergency -- and  
23 we had drivers talk about that -- they were included in that  
24 number, as well; right?

25 A. I don't recall that being the case for any of those 39. I

1 don't recall that that was what I was pointing to, but, you  
2 know, you have that in my -- in my report. It identifies the  
3 passage that I was relying upon. I don't think any of those  
4 passages concerned that example, but it's possible.

5 Q. Okay. And then you talked about, at the end of your  
6 depo -- your -- at the end of your direct testimony from  
7 Mr. Edelman, the last issue was criticism of Mr. Garcia, Ed  
8 Garcia, and his penalty calculation because, as you said, it  
9 assumed that each payroll period a driver had unpaid time;  
10 correct?

11 A. Yes.

12 Q. Okay. Now, we're not going to resolve, you and I, whether  
13 or not time was unpaid. That's not our job between you and I.

14 Would you agree with me, however, that if the plaintiffs  
15 are correct and, for example, pre-trip and post-trip has not  
16 been paid separately under the pay codes and let's assume it  
17 amounts to unpaid time, for our discussion purposes, would you  
18 agree that if that amounts to unpaid time, that would have  
19 happened in every pay period that a driver drove; correct?

20 A. Probably.

21 Q. And -- because they have to do that every day; right?

22 A. Well, you have to -- probably. But, again, I just tie it  
23 back to pay periods. But probably it would -- it would be  
24 true.

25 Q. And the same thing for rest breaks? They would probably



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1 have had rest breaks somewhere in every two-week pay period;  
2 correct?

3 **A.** I don't know that that's the case. I mean, the testimony  
4 was that some people never took -- never took unpaid rest  
5 breaks. Some people --

6 **Q.** Unpaid rest breaks, yes. Let's stop you there, because  
7 we're not going to resolve that. I apologize.

8 Okay. So -- but overall, then, if the plaintiffs are  
9 correct in their theories, then, in fact, it's very likely that  
10 every payroll period would have had at least an unpaid  
11 violation and, therefore, would fall within the category  
12 covered by that statute, 1197.1; right?

13 **A.** No. If they're correct in that one theory that everybody  
14 did a post-trip and that no post-trips and no -- and pre-trips  
15 and that those were uncompensated, then it seems probably to be  
16 the case.

17 **MR. SALTZMAN:** Okay. I have nothing further,  
18 Your Honor. Thank you.

19 **THE COURT:** Thank you.

20 **BY MR. SALTZMAN:**

21 **Q.** Oh, one last question.

22 You said you billed around \$500,000. Has that been paid?

23 **A.** I said that -- that -- that I'm sure that we billed --  
24 that the total bill has been \$500,000, and the bills were  
25 current the last time I looked.

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1 Q. So most of it would have been paid by now?

2 A. Yes.

3 MR. SALTZMAN: Okay. Thank you. No further  
4 questions.

5 THE COURT: Mr. Edelman.

6 MR. EDELMAN: Thank you, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. EDELMAN:

9 Q. Dr. Walker, good morning.

10 A. Good morning.

11 MR. EDELMAN: Ladies and gentleman, good morning.

12 BY MR. EDELMAN:

13 Q. Just with respect to this issue of payment, you read  
14 Dr. Phillips' report and his deposition; right?

15 A. Yes, I did.

16 Q. And do you recall his testimony in this courtroom that he  
17 had a large team of people who worked for him?

18 A. Yes.

19 Q. Do you remember him also disclosing in his report and/or  
20 deposition that he and his team were being paid for their time?

21 A. Yes.

22 Q. And that they had put in hundreds and hundreds of hours?

23 A. Yes, I did.

24 Q. Is it common for economists who are retained in litigation  
25 like this, whether it's Dr. Phillips or whether it's your firm,

1 to be paid --

2 A. Yes.

3 Q. -- for their time?

4 A. Yes, it is.

5 Q. You were also asked a question by Mr. Saltzman about  
6 claims run drivers.

7 A. Yes.

8 Q. And those are the guys who generally don't have a sleeper  
9 berth --

10 A. Yes.

11 Q. -- right, and stay in hotels instead?

12 A. Yes.

13 Q. And you've read the testimony that when they stay in the  
14 hotel, they still get the \$42 layover pay?

15 A. Yes.

16 Q. In the model that Mr. -- that Dr. Phillips prepared of all  
17 of the layover data where he put together that sheet of paper  
18 that we saw, did his model account for or take out those claims  
19 run drivers?

20 A. No. He's including loss estimates for all of those  
21 drivers who regularly stay in hotels rather than sleeping in  
22 their trucks.

23 Q. So he did not separate out even the claims drivers who are  
24 staying in hotels because they don't have sleeper berths and  
25 are still getting the \$42 in layover pay?

1     **A.**    That's correct.

2     **Q.**    A couple other things.  I'm going to try to be quick here  
3     today because of what we need to do in the limited time we  
4     have.

5           But yesterday, Mr. Saltzman asked you about -- some  
6     questions about one of the points you made on your board about  
7     memory -- about frequency and duration being unreliable.

8           And in particular, he sort of questioned you whether it's  
9     reasonable for you to be suggesting in some fashion that --  
10    that this jury cannot rely on the testimony of drivers who have  
11    come forward in this case and testified as to things that they  
12    did over the course of 20 years or more.

13          Do you remember that line of questioning?

14    **A.**    Yes.

15    **Q.**    And so he asked you, "Can't we rely on jurors" -- I'm  
16    sorry -- "on drivers who come in and say, 'I spent, you know,  
17    however much time day in and day out for however many years  
18    doing a pre-trip or a post-trip'."

19          Do you remember that line of questioning?

20    **A.**    I do.

21    **Q.**    So simple question for you.  Did Dr. Phillips, in his  
22    analysis, rely on either -- on any of the plaintiffs' testimony  
23    or any of the drivers who came forward in this case as to how  
24    long it took them to do a pre-trip or a post-trip over the 20  
25    or however many years that they did that?

1     **A.**    No.  For those everyday activities, he relied on just an  
2     assumption of 15 minutes for everybody.

3     **Q.**    So he used -- he did not rely on the testimony they gave;  
4     he just used his assumptions?

5     **A.**    Yes.

6     **Q.**    And on things like waiting time, there's been some  
7     testimony in this case from some of the plaintiffs about how  
8     long they think they waited over the course of ten years.

9            You've read that?

10    **A.**    Yes.

11    **Q.**    And then some of the testimony from drivers that the --  
12    that the plaintiffs' counsel have brought in to testify about  
13    how long they waited over the years; correct?

14    **A.**    Yes.

15    **Q.**    Did Dr. Phillips rely on that testimony in his analysis?

16    **A.**    No.  He just assumed that everybody waited 45 minutes per  
17    week, regardless of the testimony that they had given or the  
18    answers on the questionnaires.

19    **Q.**    And what he said was that was an assumption that he was  
20    asked to make by plaintiffs' counsel for purposes of his  
21    analysis; correct?

22            **MR. SALTZMAN:**  Objection, Your Honor.  It misstates  
23    the testimony.

24            **THE COURT:**  Well, I was going to say it's leading,  
25    which it is.  So why don't you just ask a question and we'll

1 get his response.

2 **MR. EDELMAN:** Fair enough.

3 **BY MR. EDELMAN:**

4 **Q.** From your review of Dr. Phillips' testimony, was he asked  
5 to make any kind of an assumption about waiting time?

6 **A.** Yes.

7 **Q.** What was he asked to make?

8 **A.** He assumed -- said he was asked to assume that every  
9 driver had 45 minutes of wait time -- uncompensated wait time  
10 per week, regardless of what they'd said in their  
11 questionnaires or testimony or at depositions.

12 **Q.** All right. Another question. Mr. Saltzman was talking to  
13 you yesterday about the questionnaire and the deposition  
14 process that these 39 drivers went through.

15 **A.** Yes.

16 **Q.** 40, but one of them you said only worked at Wal-Mart for a  
17 day or two, so that person didn't have anything to say; right?

18 **A.** Yes.

19 **Q.** And you recall the line of questioning about your comments  
20 about the fact that they had had to subpoena their own clients,  
21 and you had some questions about that.

22 **A.** Yes.

23 **Q.** Okay. And I'm just trying to set the stage.

24 And Mr. Saltzman said, "But isn't that appropriate or  
25 necessary to ensure the integrity of the process so that it not

1 be tainted by communications between the lawyers and the people  
2 who were going to fill out the questionnaires and be deposed?"

3 Do you remember that line of questioning?

4 **A.** I do.

5 **Q.** All right. So when the drivers who did these surveys, the  
6 39 of them, filled them out, that was before they spoke with  
7 counsel; correct?

8 **A.** Yes. So far as I know, yes.

9 **Q.** There was -- you had testified previously that there was  
10 another survey that had gone out earlier and you commented  
11 about your concerns about that. I'm not going to get back into  
12 that, but let me rephrase my question.

13 At least for purposes of the deposition, the way it was  
14 supposed to work was the drivers were supposed to come in, fill  
15 out the questionnaire before they talked to counsel.

16 **A.** That's right.

17 **Q.** Okay. After they filled out the questionnaire, and before  
18 they went into their depositions, how did the process work?

19 **A.** They all met with counsel. They all met privately with  
20 plaintiffs' counsel, and it was only then that they gave the  
21 deposition testimony that Dr. Phillips relied upon.

22 **Q.** So they had private attorney-client communications with  
23 their lawyers before they went into their depositions?

24 **A.** Yes, that's right.

25 **Q.** Do you have any concerns about whether those types of

1 private communications might taint the integrity of the  
2 deposition process on which Dr. Phillips relied?

3 **A.** Yes. I mean, this is the exact sort of unconscious bias  
4 that we were talking about or potentially conscious bias that  
5 we were talking about before.

6 So the decision not to contact potential deponent  
7 survey-takers before coming in -- well, one, it's already been  
8 tainted because they all got a letter, but to the extent that  
9 it preserves anything, it preserves the integrity of the  
10 questionnaire.

11 But Dr. Phillips didn't rely just on the questionnaire, he  
12 relied primarily on the deposition. The deposition occurred  
13 immediately after a private conference and meeting with  
14 plaintiffs' counsel, and so it introduces the potential for  
15 bias that can't be measured.

16 **Q.** All right. And my last line of questioning relates to  
17 some of the questions you were asked yesterday about some of  
18 the hard data that Dr. Phillips had.

19 **A.** Yes.

20 **Q.** And do you remember that at some point during the  
21 questioning, Mr. Saltzman said to you, "Didn't the fact that  
22 Dr. Phillips relied on some hard data render your concerns that  
23 you had spent the morning testifying about irrelevant?"

24 **A.** Yes.

25 **Q.** And you said, "No."



1     **A.**    Yes, that's right, I said, "No."

2     **Q.**    I want to try to clear up what hard data he had, how he  
3     used it, and what hard data he did not have.

4            So let's first talk about the hard data relating to the  
5     Department of Transportation --

6     **A.**    Yes.

7     **Q.**    -- the DOT breaks.

8     **A.**    Yes.

9     **Q.**    What was the time period for which there was hard data  
10    available?

11    **A.**    I think it was 2013 through 2015, and then there was a  
12    question even about whether he had complete data for 2014. So  
13    it's 2 or 3 years out of the 11.

14    **Q.**    Out of the 11.

15            What did Dr. Phillips do for the remaining time in the  
16    class period?

17    **A.**    He extrapolated backwards based upon assumptions, rather  
18    than on hard data.

19    **Q.**    Let's talk about Gasboy.

20            The Gasboy data is the data that Wal-Mart had that showed  
21    the frequency of fueling of trucks.

22    **A.**    Yes.

23    **Q.**    It doesn't show how much time was spent fueling, it just  
24    shows how often a particular truck or driver identification  
25    number is associated with a fueling event; correct?

1     **A.**     Actually, it just shows the truck.  It doesn't establish  
2     that the driver filled the truck.

3             But, yes, it's -- it doesn't have frequencies.

4     **Q.**     Okay.  And, first, for what period of time was the Gasboy  
5     data available?

6     **A.**     If I can correct, I said it doesn't have frequencies.  It  
7     doesn't have the length of time.  It does have frequencies.

8             And it's only available for a few years, I think, again,  
9     2013 to 2015, 2 or 3 years out of the 11.

10    **Q.**     And is it -- is it your understanding that prior to that,  
11    Wal-Mart had not contracted with Gasboy?

12    **A.**     That's right.  This is a private company that developed  
13    these data, and it's my understanding Wal-Mart didn't contract  
14    with them before.

15    **Q.**     Okay.  Now, what did Dr. Phillips do with the Gasboy data?

16    **A.**     Well, he -- again, he extrapolated backwards in time based  
17    on assumptions that were just assumptions without any basis in  
18    fact.

19             And, also, he again had to rely on his hybrid data in his  
20    extrapolations to estimate how long it took to fill the tank  
21    when it was filled.

22    **Q.**     Because the Gasboy data doesn't show that?

23    **A.**     Correct.

24    **Q.**     And so what were -- even with the hard data that  
25    Dr. Phillips had for the Gasboy data -- that is, the data that

1 showed how often a truck or a driver ID number is associated  
2 with fueling -- do you consider what he did to be reliable?

3 **A.** No --

4 **Q.** Why not?

5 **A.** -- it's not reliable.

6 Because he's still relying on the hybrid data for the  
7 length of time that it took. It's not enough to know how  
8 frequently the trucks were filled. You need to know how long  
9 it took to fill them.

10 And then also he was extrapolating backwards in time under  
11 the assumption that the circumstances regarding refueling would  
12 mean that you refuel it just as often in the earlier years as  
13 you did in the later years. And when I looked at the Gasboy  
14 data, I saw an upward trend in the frequency at which the tanks  
15 were being refueled, which would call into question the  
16 reliability of that assumption.

17 So even where he relied partially on the Gasboy data, he  
18 was still relying upon the hybrid data for times, which is  
19 subject to all of those problems on the board, and he was  
20 extrapolating backwards in time for most of the class period  
21 and close -- most of the class members.

22 **Q.** You said when you looked at the data, you saw an increase  
23 in the frequency with which trucks were being refueled?

24 **A.** Yes, that's right.

25 **Q.** Meaning that in prior years, it -- the trucks might have

1     been fueled less frequently?

2     **A.**     That's right.

3     **Q.**     And are you aware that at some point during the class  
4     period, the size of the tanks on the trucks changed from 150  
5     gallons on either side to 100 gallons on either side?

6     **A.**     Yes.

7     **Q.**     And so there was less fuel on a truck in subsequent years?

8     **A.**     Yes.

9     **Q.**     Might that be an explanation for why there was --

10           **MR. SALTZMAN:**   Objection --

11     **BY MR. EDELMAN:**

12     **Q.**     -- an increase in fueling later, as opposed to earlier, in  
13     the trend that you saw?

14           **THE COURT:**   Stop.

15           What's your --

16           **MR. SALTZMAN:**   Objection.   Leading, Your Honor.   Calls  
17     for speculation.

18           **THE COURT:**   It is leading.

19           **MR. EDELMAN:**   All right.   I'll ask it differently.

20           **MR. SALTZMAN:**   Well, it still -- go ahead.

21     **BY MR. EDELMAN:**

22     **Q.**     Did Dr. Phillips, in his analysis of frequency of fueling,  
23     account for this upward trend in frequency of fueling that you  
24     saw in the data?

25     **A.**     No.

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1           **MR. SALTZMAN:** Objection, Your Honor. Leading and  
2 calls for speculation.

3           **THE COURT:** Overruled. The answer may stand.

4           **THE WITNESS:** No. He ignored it.

5 **BY MR. EDELMAN:**

6 **Q.** Did he, in his work, make any mention, either in the  
7 report or in the testimony, about changes in the size of the  
8 tanks on the trucks?

9 **A.** No.

10 **Q.** Let's talk briefly about this minute -- per-minute  
11 calculator that Dr. Phillips came up with.

12           **MR. EDELMAN:** And, Tracy, if I could ask for your  
13 assistance, please, just for the ELMO. Thank you.

14           **THE CLERK:** You want the ELMO? Okay.

15           **MR. EDELMAN:** Perfect.

16 **BY MR. EDELMAN:**

17 **Q.** So this per-minute calculator that Dr. Phillips has  
18 provided --

19 **A.** Yes.

20 **Q.** -- and that Mr. Saltzman asked you about yesterday --

21 **A.** Yes.

22 **Q.** -- is this -- in your view, does -- is this an accurate  
23 way for the jury -- is this an accurate tool for the jury to  
24 use in considering loss or damages in this case?

25 **A.** No.

1 Q. Why not?

2 A. Because you need to know the frequency and the length of  
3 time spent on these activities. In order to assess loss, you  
4 need to know how many minutes were uncompensated.

5 And all this goes to is if you knew how many minutes were  
6 uncompensated on average, then on average, this could translate  
7 that into a class-wide figure.

8 But unless you know, even on average, how many minutes  
9 were spent on these activities, this calculator is useless.  
10 And if you're trying to figure out individual people's  
11 uncompensated time, even knowing the on-average figure doesn't  
12 help you, because we know that on an individual basis, there's  
13 all sorts of variety.

14 So unless you know for each of the 840 class members how  
15 much time they spent on these allegedly uncompensated  
16 activities, you can't calculate their loss.

17 And if you do know on an individual basis, this number has  
18 absolutely nothing to do with them because this is an  
19 aggregation of a whole bunch of people, rather than any -- than  
20 any individual.

21 Q. So does -- does use of this calculator that Dr. Phillips  
22 has attempted to provide implicate all of the problems that are  
23 on Defendant's Exhibit 687 and to which you testified  
24 yesterday?

25 A. It doesn't respond to any of them.

1 Q. All right. And will any of the evidence that has  
2 presented -- that has been presented in this trial allow the  
3 jury to make a reasonable and reliable estimate of the amount  
4 of time that the 800 or so plaintiffs who have not testified  
5 and whom we know nothing about in fact spent on the activities  
6 in this case?

7 A. No.

8 MR. EDELMAN: All right. I want to -- if we could  
9 pull up -- well, I think a better way for me to do it is just  
10 to stay with the ELMO. I'm going to pull up Slide 13 from  
11 yesterday.

12 BY MR. EDELMAN:

13 Q. This is one of your slides where you showed for end-of-day  
14 meetings -- you showed a very broad -- what would you call  
15 that? Range or margin of error or --

16 A. Either one is fine.

17 Q. All right.

18 -- for -- this is for -- for one particular driver?

19 A. Yes.

20 Q. All right. And then -- and so that range was between \$810  
21 and over \$118,000; right?

22 A. Right.

23 Q. And then Mr. Saltzman put up his -- their chart or list  
24 for end of day and he said, "But, look, all we're asking for is  
25 3,875,116 for the time period of '05 through '15 and then a

1 \$438,000 figure for 2004 through -- period through 2004 and  
2 2005 and asked you isn't that a conservative, reasonable  
3 estimate?

4 **A.** Yes.

5 **Q.** And that's my question to you. Is what they did, in light  
6 of your concerns in Slide 13, a reasonable and accurate  
7 estimate?

8 **A.** No, it is not reasonable and accurate.

9 **Q.** Is it conservative?

10 **A.** It's not reasonable, accurate, or conservative.

11 **Q.** Why not?

12 **A.** This has to do with the variability by person, and what  
13 this is showing is that people will tend to be grossly overpaid  
14 or overcompensated or grossly undercompensated by Dr. Phillips'  
15 method.

16 And the people that are overcompensated, when you look at  
17 the whole, are, you know, offset by people that are  
18 undercompensated. So when you look at the whole, because it is  
19 an average, if you assume all -- away all of the things on the  
20 board, if you assume that the questionnaire is accurate and  
21 people's memories are accurate and Dr. Phillips' crew  
22 transcribed the depositions appropriately, if you assume all  
23 those things are correct, then the dispersion we were talking  
24 about suggests that individual damages are going to be grossly  
25 inaccurate. And the \$4 million doesn't change that.



1           The -- at the individual level, some people would be  
2 getting large awards when perhaps they didn't suffer any loss  
3 at all; some people would be getting very tiny awards when  
4 perhaps they were the ones that actually had some uncompensated  
5 time. So that's what this was all about, and that's why it's  
6 not reliable, even at the individual level.

7           The other reason that it's not reliable or conservative is  
8 that we know that those other points on the board still exist.  
9 So the 4 million number is based upon the people's  
10 recollections about how frequently things occurred and how long  
11 they lasted. And to the extent we were able to test that, it  
12 was inflated by, you know, I think close to 60 percent in terms  
13 of the frequency at which things happened, close to 60 percent  
14 in terms of how long they happened. And taken together, that  
15 could have an impact of over 150 percent. So that's not  
16 conservative at all.

17           And then we also saw that Dr. Phillips' interpretations of  
18 what people said was highly subjective, and in some cases, it  
19 was clearly incorrect and in a way that would tend to inflate  
20 the damages numbers or the loss numbers that he calculated.

21           And, finally, we know that Dr. Phillips' sample of 39 or  
22 40 people is overly comprised of folks who were former Wal-Mart  
23 employees, who tended to answer that things occurred more  
24 frequently and took longer than the nonemployee -- than the  
25 noncurrent employees do, so that the sample group's stated

1 experiences would overstate the amount that the rest of the  
2 class would tend to say.

3 So for all of the reasons we talked about yesterday, it's  
4 not a conservative estimate at all, nor is it reliable on  
5 either the individual level or the aggregate level.

6 Q. All right. Just a few questions and then I'm going to be  
7 done.

8 I want to get back to this question of hard data --

9 A. Yes.

10 Q. -- and make sure we all have a clear understanding, before  
11 you leave, of what Dr. Phillips purported to rely on hard data  
12 for and what he didn't.

13 So here is the question. Did Dr. Phillips rely on hard  
14 data for the amounts of time any of the class members spent on  
15 the following tasks:

16 Rest breaks?

17 A. No.

18 Q. What did he do?

19 A. For rest breaks, he relied on the -- an assumption that  
20 everybody had 20 minutes of unpaid rest every shift. It was  
21 just an arbitrary assumption. It was not based on any hard  
22 data.

23 Q. Pre-trip and post-trip inspections. Did he rely on hard  
24 data?

25 A. Certainly not for the amount of time it took. He just

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1     relied on an assumption that it was 15 minutes for everybody  
2     every time for each of those tasks.

3     **Q.**     Fueling at Wal-Mart. Did he rely on any hard data as to  
4     how much time the drivers spent fueling?

5     **A.**     The amount of time per event was not based on any hard  
6     data.

7     **Q.**     The Gasboy data only showed the frequency, not the amount  
8     of time; right?

9     **A.**     Correct. And it didn't cover all the people for all the  
10    time.

11    **Q.**     Right. It was only for a limited period of time?

12    **A.**     Yes.

13    **Q.**     Fueling away from the distribution center?

14    **A.**     Didn't rely on hard data at all.

15    **Q.**     Washing?

16    **A.**     Did not rely on hard data at all.

17    **Q.**     Did he rely on any hard data as to whether drivers washed?

18    **A.**     No.

19    **Q.**     Did he rely on any hard data as to how often they washed?

20    **A.**     No.

21    **Q.**     Did he rely on any hard data as to how long the washing  
22    took?

23    **A.**     No.

24    **Q.**     Weighing. Did he rely on any hard data as to how long  
25    weighing took?

1     **A.**    No, he did not.

2     **Q.**    Driver coordinator, whether you call them conversations  
3     over the counter or if you want to call them meetings, as the  
4     plaintiffs do. Did he rely on any hard data as to how long it  
5     takes for those to happen?

6     **A.**    Nope.

7     **Q.**    Did he rely on any hard data as to wait time?

8     **A.**    No, he did not.

9     **Q.**    Did he rely on any hard data as to, on layovers, how much  
10    time class members actually spent in their truck?

11    **A.**    No, he did not.

12    **Q.**    Is there any reliable way, any reliable evidence, on which  
13    the jury could determine loss associated -- alleged loss  
14    associated with the following tasks:

15         Rest breaks?

16    **A.**    No.

17    **Q.**    Pre-trip and post-trip inspections?

18    **A.**    No.

19    **Q.**    Fueling at Wal-Mart?

20    **A.**    No.

21    **Q.**    Fueling away from the DC?

22    **A.**    No.

23    **Q.**    Washing?

24    **A.**    No.

25    **Q.**    Weighing?

## WALKER - REDIRECT / EDELMAN

1     **A.**    No.

2     **Q.**    Driver coordinators?

3     **A.**    No.

4     **Q.**    DOT or CHP inspections?

5     **A.**    No.

6     **Q.**    Wait time?

7     **A.**    No.

8     **Q.**    Or time -- time spent in the sleeper berth on a layover?

9     **A.**    No.

10    **Q.**    Is there any reason to believe, Dr. Phillips, that the  
11    named plaintiffs who testified at trial are representative of  
12    the 800-plus class members whom we know nothing about?

13    **A.**    Well, you called me Dr. Phillips, but the answer is still  
14    no.

15    **Q.**    He is on my mind. Let me rephrase.

16           Is there any reason, Dr. Walker, for us -- for the jury to  
17    believe that the named plaintiffs who testified at trial are  
18    representative of the 800-plus class members whom we know  
19    nothing about?

20    **A.**    They are not representative in any statistical sense, no.

21    **Q.**    And briefly, because we have in mind your prior testimony,  
22    why not?

23    **A.**    Because they were not selected in a random way. People do  
24    not become named plaintiffs by some random process, nor do  
25    either side's lawyers tend to choose witnesses by a random

**WALKER - RECROSS / SALTZMAN**

1 process.

2 **Q.** And is there any reason to believe that the drivers who  
3 testified at trial -- some of them were not named plaintiffs,  
4 but including the named plaintiffs -- are representative of the  
5 800-plus drivers whom we know nothing about?

6 **A.** Not in any statistically-reliable sense, no.

7 **MR. EDELMAN:** Thank you.

8 **THE WITNESS:** You're welcome.

9 **THE COURT:** Anything further, Mr. Saltzman?

10 **MR. SALTZMAN:** Yes, Your Honor. Thank you.

11 **RECROSS-EXAMINATION**

12 **BY MR. SALTZMAN:**

13 **Q.** Have you ever testified in a class action before?

14 **A.** Yes, I have.

15 **Q.** Did you just say that the named plaintiffs are not proper  
16 because they were not randomly selected?

17 **A.** I did not say that, no. I said that they are not  
18 statistically representative of the class, so that one cannot  
19 draw reliable conclusions about the class from their  
20 circumstances, given that there is a wide variety of  
21 experiences across people and over time.

22 **Q.** Let me read to you from the transcript, sir:

23 "And briefly, because we have in mind your prior  
24 testimony, why not?" And this is as to the plaintiffs, the  
25 representatives.

1 Answer, "Because they were not selected in a random way."

2 Do you believe that representatives -- that the plaintiffs  
3 in a class action have to be selected in a random way?

4 **A.** If -- if the question is in order for them to be a  
5 statistically-representative group whose experiences will yield  
6 reliable information about the class that you can extrapolate  
7 to the class, under circumstances where people vary, where some  
8 people engage in tasks really frequently and some people engage  
9 in tasks not at all, some people take a long time, some people  
10 don't -- in circumstances such as that, where you're trying to  
11 extrapolate from this group of named plaintiffs to the class,  
12 yes.

13 If the issue is is this group statistically representative  
14 of the class, yes, they have to be chosen in some random way in  
15 order for that to be true.

16 **Q.** Okay. So let me ask you, how many class actions have you  
17 been involved in as a witness?

18 **A.** I don't know. I can't answer that without looking at my  
19 CV and going through the classes.

20 **Q.** Over 20?

21 **A.** No. You mean as -- have I testified as a -- as a witness  
22 in a --

23 **Q.** Or been a consultant.

24 **A.** There have been cases where I consult with people and  
25 don't -- don't testify, and I don't keep track. So I don't

## WALKER - RECROSS / SALTZMAN

1 know what the numbers are.

2 Q. Isn't it correct, sir, that in most class actions, as  
3 compared to this one, where there is nine representatives --  
4 isn't it correct, sir, that in most class actions, there is  
5 maybe one or two named plaintiffs who step forward, especially  
6 in employment litigation, to actually make class action claims  
7 against their employers?

8 A. I don't know whether that's true or not.

9 Q. You don't.

10 Well, let's assume that this case had one representative  
11 plaintiff instead of nine.

12 A. Yes.

13 Q. Can you tell me, sir, and tell the jury, how one  
14 representative plaintiff, who has the right to file a proposed  
15 class action, could ever be randomly selected to handle -- to  
16 step forward as a class? How could one person ever be randomly  
17 selected?

18 A. I don't -- I don't actually know how it is that -- that  
19 plaintiffs' counsel find class reps. I don't know --

20 Q. How about how class reps find plaintiffs' counsel, sir?

21 A. I don't know that it happens that way either. I don't  
22 know whether it's a random process when it's the case that  
23 plaintiffs' counsel chooses a rep. I just don't know. But I  
24 don't know --

25 Q. Are you saying, sir, that plaintiffs' counsel go out



## WALKER - RECROSS / SALTZMAN

1 and -- go out and choose the case or aggrieved employees go  
2 looking for and find an employer -- a counsel to represent  
3 them?

4 **MR. EDELMAN:** Excuse me, Your Honor. This is  
5 inappropriate.

6 **THE COURT:** Well, it's argumentive. It's not going to  
7 shed much light.

8 **MR. SALTZMAN:** I'll move on.

9 **THE COURT:** I'll let him answer because I bet the  
10 answer is, "I don't know."

11 **MR. SALTZMAN:** I would probably anticipate that, so  
12 I'll move on. Thank you.

13 **THE COURT:** All right.

14 **BY MR. SALTZMAN:**

15 **Q.** So just to close out this issue, when you said earlier  
16 that you -- they were not proper because they had not been  
17 randomly selected to be class representatives, you don't stand  
18 by that statement any longer, do you?

19 **A.** Well, I never said that. What I said --

20 **Q.** Well, actually, you did say that, sir. I just read it  
21 back to you.

22 **MR. EDELMAN:** Objection, Your Honor. Misstates his  
23 prior testimony.

24 **THE COURT:** Sustained.  
25

1 **BY MR. SALTZMAN:**

2 **Q.** Did you -- did you read the trial testimony of the driver  
3 witnesses who came in here to testify to this jury before you  
4 came into this courtroom yesterday?

5 **A.** Many of them, yes.

6 **Q.** Okay. So the jury had the benefit or has had the benefit  
7 not only of the summaries and the estimates derived from the  
8 depositions and from other data, but also of the live testimony  
9 of many drivers; correct?

10 **A.** Yes.

11 **Q.** And is it appropriate for the jury, in your mind, to take  
12 into account the testimony of the live witnesses who came into  
13 this courtroom to testify as to the facts of this case?

14 **A.** Appropriate? I assume so. Accurate? It depends on what  
15 they're using it for.

16 **Q.** Okay. And to the extent that witnesses came in -- excuse  
17 me -- and some of them testified that it took 15 minutes for a  
18 pre-trip or a post-trip, some may have testified to 10 minutes,  
19 there would be variances because, in fact, people have exact --  
20 don't have exactly the same experiences; correct?

21 **A.** There -- there are variances for a number of reasons, one  
22 of which is their experiences vary from person to person, yes.

23 **Q.** And all of that, whether it was from the 40 depositions or  
24 from the live testimony in front of this jury, all of that  
25 together is something the jury should consider in determining

1 what the appropriate amount of time, how to work with or accept  
2 testimony, and how to determine how much time they believe  
3 tasks took -- wouldn't you agree that that is the jury's  
4 function?

5 **A.** I think this is way out of my realm. I think that, you  
6 know, the Court will give instructions on what they should do.  
7 It's not --

8 **Q.** Okay.

9 **A.** -- for me to tell them to do that.

10 **Q.** Now, the per-minute calculation that you criticized,  
11 assuming that the jury, instead of accepting 15 minutes for a  
12 pre-trip inspection, if they thought it was 16 minutes or 14  
13 minutes, Dr. Phillips has provided them with a tool by which  
14 they could then determine their own number, rather than  
15 anything that either side has suggested; correct?

16 **A.** Sure. The jury could come up with some number randomly  
17 and apply this one minute, but --

18 **Q.** Randomly?

19 **A.** -- the point -- yes, randomly. I thought that was what  
20 you were saying, if the --

21 **Q.** No. The jury --

22 **A.** -- if the jury, without any information, comes to some 14-  
23 or 16-minute number.

24 And I've seen the testimony. There's no basis for such a  
25 number. But if the jury randomly comes up with a number, they

1 can multiply it by his calculator.

2 But the point was there's no basis to come up with such a  
3 number. That's why the calculator is useless.

4 Q. And part of why you thought it wasn't useful was because  
5 it didn't tell the jury how much time each and every driver  
6 spent doing those tasks, right, individually; right?

7 A. That's one of many reasons that the calculator is useless.

8 Q. So coming back to your class action experience, is it your  
9 belief that when you told the jury that, that each and every  
10 driver has to be individually calculated in order to come to a  
11 global number in a class action?

12 A. You're missing -- you're mixing up general cases, talk --  
13 discussions about sort of general circumstances, all class  
14 actions, and you're conflating that with the circumstances  
15 here.

16 The circumstances here --

17 Q. No. Let --

18 A. -- involve people who were widely different in terms of  
19 the frequency at which they engage in the tasks, the amount of  
20 time that it takes, and in the -- and the amount at issue is  
21 very large. You know, a hundred thousand dollars or so per  
22 person is the allegation.

23 And in circumstances such as that, yes, I think that the  
24 accurate thing to do is to go through these things one by one  
25 to make sure that it's right.

## WALKER - RECROSS / SALTZMAN

1 But is that the case with all class actions? No. There  
2 are lots of class actions that are different, where you're  
3 talking about rote activities where everyone is doing the same  
4 thing over and over and over again, and in which case any one  
5 individual would be somewhat representative of everybody else.

6 But that's not the case --

7 **Q.** So your --

8 **A.** That's not the case that we have here.

9 **Q.** So your instruction or your preference would be that we  
10 bring in 800 drivers to testify individually in order to have  
11 this class action, which is brought forth by representative  
12 plaintiffs, properly presented to this jury? You think that  
13 they need to hear from all 800 people? That's your bottom  
14 line?

15 **A.** I'm saying that in order to be accurate, given the wide  
16 disparate circumstances that we see here, there is a need for  
17 individualized evidence --

18 **Q.** Okay.

19 **A.** -- and that if it's not there, given the wide disparate  
20 variety of activities and experiences, the individual damages  
21 are going to be grossly inaccurate, and for all those other  
22 reasons, they are going to be grossly inaccurate whether you do  
23 it on an individualized basis or not.

24 **MR. SALTZMAN:** Okay. I have no further questions,  
25 Your Honor.

**WALKER - FURTHER REDIRECT / EDELMAN**

1           **THE COURT:** Thank you.

2           Anything further?

3           **MR. EDELMAN:** A couple really quick questions,

4           Your Honor.

5                           **FURTHER REDIRECT EXAMINATION**

6           **BY MR. EDELMAN:**

7           **Q.** Dr. Walker, the -- you're aware that there are cases that  
8           are class actions and there are cases that are not class  
9           actions?

10          **A.** Yes.

11          **Q.** Are you purporting to testify in this case that every case  
12          that is styled as a class action requires every class  
13          representative to come in and testify?

14          **A.** No.

15          **Q.** Are you saying that in this particular case, for this jury  
16          to get an accurate or better assessment of damages, that would  
17          be necessary?

18          **A.** Yes.

19          **Q.** So you're saying this case is different from other  
20          possible class actions where the data is different?

21          **A.** Yes.

22          **Q.** Okay. Now, do you have any information in this case as to  
23          whether the plaintiffs' lawyers selected the class  
24          representatives, as opposed to the class representatives coming  
25          to the plaintiffs' lawyers?

## WALKER - FURTHER REDIRECT / EDELMAN

1     **A.**     I don't.

2     **Q.**     You don't know how it happened in this case?

3     **A.**     I don't know how it happened in this case.

4             **MR. EDELMAN:** No further questions, Your Honor.

5             **THE COURT:** Thank you.

6             **MR. SALTZMAN:** No further questions, Your Honor.

7             **THE COURT:** Thank you.

8             May the witness be excused? Yes?

9             **MR. SALTZMAN:** Yes on the plaintiffs' side.

10            **MR. EDELMAN:** Yes, Your Honor.

11            **THE COURT:** Thank you very much, sir. You're excused.

12            **THE WITNESS:** Thank you.

13            **THE COURT:** Okay. The defendants may call their next  
14 witness.

15            **MS. CONWAY:** Gary Martin, Your Honor.

16            **THE CLERK:** I'm going to take your picture.

17            **THE WITNESS:** Okay.

18            **THE CLERK:** Thank you.

19            Raise your right hand.

20                            **GARY MARTIN,**

21 called as a witness for the Defendant, having been duly sworn,  
22 testified as follows:

23            **THE CLERK:** Pull that microphone or scoot in closer.

24            State your full name for the record.

25            **THE WITNESS:** Gary Lewis Martin.

**MARTIN - DIRECT / CONWAY****DIRECT EXAMINATION**

**BY MS. CONWAY:**

**Q.** Mr. Martin, can you spell your name for the record?

**A.** G-A-R-Y, L-E-W-I-S, M-A-R-T-I-N.

**Q.** Good morning, Mr. Martin. I'm Cathy Conway, and I represent Wal-Mart.

**MS. CONWAY:** Good morning, ladies and gentleman of the jury.

**Q.** Mr. Martin, are you currently employed?

**A.** Yes, I am.

**Q.** Who is your employer?

**A.** Wal-Mart Transportation -- or Stores.

**Q.** What is your job title?

**A.** I'm a truck driver.

**Q.** Okay. And how long have you been a truck driver for Wal-Mart?

**A.** I'm two months into my 26th year.

**Q.** Prior to joining Wal-Mart, how many years of trucking experience did you have?

**A.** Just a little over 20.

**Q.** What distribution center do you work out of?

**A.** They call it 6821, which is located in Porterville, California.

**Q.** And can you tell me what your typical work schedule is?

**A.** I go to work on Sunday and I get one of their trucks, and



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1 I drive all around the United -- or not -- I drive around the  
2 western part of the United States delivering Wal-Mart freight.

3 I don't do the exact same thing every day; I just -- a  
4 little bit different every day.

5 **Q.** And can you make sure you speak up so you can -- the jury  
6 can hear you?

7 **A.** Oh, sorry.

8 **Q.** How much money do you make a year?

9 **A.** I think I'm on target right now to make right about  
10 \$106,000.

11 **Q.** And how did you come to work for Wal-Mart?

12 **A.** I think it was about 1987, the guy that lived across the  
13 street from me, he's a truck driver, him and his dad -- and  
14 he's -- originally -- his mom is originally from the  
15 Bentonville -- not Bentonville, but the Arkansas area.

16 And he went back there when he was unemployed to go visit  
17 with some cousins and members on his mom's side of the family  
18 that he'd never seen and wound up getting a job driving for  
19 Wal-Mart.

20 When he came back for Christmas, he tried to talk me into  
21 moving to Arkansas to get the world's best truck driving job.  
22 And at that time, I was going to move to Arkansas for a job,  
23 but he kept coming every year, and I think he went to work  
24 there in '84.

25 And sometime around 1989, he told me, he said, "You don't

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1 have to move to Arkansas. Wal-Mart is coming to California."  
2 And he kind of kept me informed, got me an application, so I  
3 was able to apply for the job when they first showed up out  
4 here and eventually go to work for them.

5 **THE COURT:** Ms. Conway, I'm having a real hard time --

6 **MS. CONWAY:** Okay.

7 **THE COURT:** -- hearing him.

8 **MS. CONWAY:** Let -- may I approach the witness and --

9 **THE COURT:** Sure.

10 **MS. CONWAY:** -- move the microphone? Thank you, Your  
11 Honor.

12 You have a low, gravelly voice, and we're all trying to  
13 catch --

14 **THE WITNESS:** Yes, I do. Okay. Is that better?

15 **MS. CONWAY:** Is that better? That's better, Your  
16 Honor?

17 **THE WITNESS:** Okay. Thank you.

18 **THE COURT:** Speak real slowly, and then we'll get  
19 every word.

20 **THE WITNESS:** Okay.

21 **THE COURT:** Thank you.

22 **BY MS. CONWAY:**

23 **Q.** Did you do anything to check Wal-Mart out before joining  
24 them?

25 **A.** I had never really seen one until they built the store in

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1 Bakersfield where I live, and I didn't really know anything  
2 about the store or the company, their transportation part. I  
3 just listened to my buddy Kenton what he told me, and it  
4 just -- the more he talked about it, the better it sounded.

5 And at the time, Kmart used to have their own private  
6 fleet of trucks, and that was considered a very good job. So  
7 the only way I could relate to it was Wal-Mart was like Kmart  
8 with chrome on it. If you don't know, truckers love chrome.  
9 It's like motorcycles. So it just made everybody understand  
10 what we were talking about, that Wal-Mart transportation was  
11 probably a pretty good gig.

12 Q. So you thought Wal-Mart was like Kmart with chrome?

13 A. Yes, ma'am. Someplace I wanted to go to work for.

14 Q. Okay. And so what year did you join Wal-Mart?

15 A. 1991.

16 Q. How did you learn about this lawsuit?

17 A. I got a letter from a law firm out of Fresno, I believe it  
18 was.

19 Q. Did you read the letter?

20 A. Yes, I read the letter.

21 Q. What did you do with the letter when you got it?

22 A. I threw it in the -- threw it in the trash.

23 Q. Did you --

24 A. That was the first letter.

25 Q. How many letters did you get?

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1     **A.**    I'm not sure if it was two or three, but at one point I  
2     got a letter with an option clause and a -- like a postcard  
3     that said I could sign this and opt out of the lawsuit.

4           And so I immediately filled it out and mailed it back to  
5     them.

6     **Q.**    And after you -- before signing that option to opt out and  
7     mailing it, did you get any contact from anyone at Wal-Mart in  
8     reference to that letter?

9     **A.**    Absolutely nobody.

10    **Q.**    Why did you decide to opt out of the lawsuit?

11    **A.**    I don't feel that I was owed any money.  When I cash my  
12    check every two weeks, what I perform, the duties that I've  
13    done, the miles that I drove, I felt that I was adequately  
14    compensated for everything that I did, so when I cashed that  
15    check on Friday, I felt we were pretty much even.

16           Wal-Mart has never cheated me out of anything or I felt  
17    that they owed me anything, and to accept the money in this --  
18    this particular matter, I just didn't think I wanted any part  
19    of it.

20    **Q.**    Has Wal-Mart put any pressure on you to testify today?

21    **A.**    None whatsoever.

22    **Q.**    Are you afraid for your job?

23    **A.**    No.

24    **Q.**    Why are you testifying on behalf of Wal-Mart today?

25    **A.**    I like the place I work.  They've taken pretty good care

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1 of me. They actually -- they obviously pay me pretty decent  
2 for what I do, and I just -- I kind of felt like it was a  
3 personal assault on me. I've said to my wife, "I almost feel  
4 like my house is being burglarized and someone is trying to  
5 break in and take something that doesn't belong to them."  
6 That's just how I feel.

7 And so I've kind of felt like I wanted to step up and do  
8 something I could do to try to help that be resolved.

9 Q. Did you feel obligated to testify?

10 A. I don't know if you'd call it obligated. I just felt  
11 something within my own being that I just wanted to do what I  
12 could do to help, and if I was asked to testify, obviously,  
13 that's what I'm doing.

14 Q. In addition to driving, have you ever had any other roles  
15 at Wal-Mart?

16 A. I've been a driver mentor over the years where they --  
17 after they go through orientation, all the classes, they learn  
18 about insurance and all of that, then a senior driver takes  
19 them out for a week to get them used to the paperwork, how our  
20 computers in the truck work, and just kind of get them up to  
21 speed with the Wal-Mart. And so I've done that for quite a few  
22 years. I've probably mentored at least a dozen drivers or  
23 more, maybe 15.

24 I've -- also was involved when they first put the  
25 computers in the trucks. I was the Qualcomm -- that's what we

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1 use, a Qualcomm. I don't know if you ever heard about those,  
2 but it's an onboard computer system. I helped in the  
3 installation and the training of all the drivers on how this  
4 piece of equipment worked. And I actually spent almost 14  
5 months working in the office without even driving a truck.

6 Q. And in reverse order, in reference to the Qualcomm  
7 computer system, did that make your job as driver easier?

8 A. Yeah. When they -- when they put the computer in the  
9 truck, that way you have -- it's a satellite communication  
10 system where you don't have to get out of the truck and use the  
11 telephone. When they want to relay information to you, they  
12 can send it to you over this computer in the truck.

13 Q. And when they send information over the computer in the  
14 truck, do you have to read it?

15 A. They've disabled it where it can't be read while you're  
16 driving, for safety purposes, but it's got a button you can  
17 push and the Sirius lady, Jill, she reads it to you.

18 Q. Okay. So Jill tells you any --

19 A. Yeah. Whatever the message they send you, then she can  
20 read it to you.

21 Q. Okay. And you listen?

22 A. Yeah. The same thing -- we have a GPS in there, too, so  
23 if you don't know where -- they send you to a place you've  
24 never been to, you can put the information in the GPS and then  
25 they read you a direction, "Take left turn, right turn." You

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1 know how that works.

2 **Q.** So the computer is there to make your driving life easier?

3 **A.** Yes. It's just another tool that we have at our

4 availability to lighten the load, sort of.

5 **Q.** And you assisted in the implementation of that; is that  
6 correct?

7 **A.** Yes.

8 **Q.** Now, talking about your mentoring time, what kind of  
9 mentoring did you do around pay issues at Wal-Mart?

10 **A.** Well, that always comes up, because everybody wants to  
11 know how much they're going to get paid. That's always a big  
12 issue.

13 So the way I used to do it, I just -- I wouldn't tell much  
14 about that for three days, kind of, you know, load it up as a  
15 surprise. So I would go with them Monday, then Tuesday, and I  
16 would wait until Wednesday, then I would get a calculator and  
17 I'd let them know how much they made for each day, and they  
18 would usually have a pretty good surprised look on their face  
19 that they made that much money for what they -- "I just did  
20 this little bit and I got that much?" And I said, "Yeah.  
21 That's how it works. We get paid pretty good for what we do."

22 **Q.** And did you describe the activity codes at Wal-Mart and  
23 how they impacted the driver?

24 **A.** Well, that's part of the mentoring system, to let them  
25 know how the codes are used, when to use them, how to fill out

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1 their trip sheet. Yeah. That's all part of the mentoring --  
2 you let them know what each code is, what it pays, and so  
3 forth.

4 **Q.** Let's take a few minutes and look at some of these  
5 activity codes.

6 **A.** Okay.

7 **Q.** Have you seen the codes shown in Defendant's Exhibit 619  
8 before?

9 **A.** Yes.

10 **MS. CONWAY:** Can we put it up on the board so he can  
11 see it?

12 **Q.** You can see it right there.

13 **A.** Oh, there it is.

14 **Q.** Are these the current activity codes that you deal with as  
15 a driver?

16 **A.** Yes, they are.

17 **Q.** And when you're talking to your mentees about the activity  
18 codes, do you describe what is involved in reference to an  
19 arrive and a drop?

20 **A.** Yes.

21 **Q.** And do you discuss how the activity code kicks in in  
22 reference to a hook and a depart?

23 **A.** The best you can. Some -- that's the other part. You  
24 know, you don't know what I'm talking about. It's confusing to  
25 understand what you're listening to. But, you know, you try to



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1 do your best so they understand what -- what -- how the whole  
2 thing works.

3 It's actually not as difficult as you might think it is,  
4 but we do the best we can to try to explain it out.

5 Q. Are these terms that Wal-Mart uses in reference to these  
6 activity codes?

7 A. Probably the only term that's basic in the trucking  
8 industry is "drop" and "hook." That's pretty much a word  
9 that's used throughout the industry.

10 Some of the other stuff is just -- we call it "Wal talk."  
11 It's our own little language for Wal-Mart.

12 But the "drop" and "hook" and some of this other stuff,  
13 "live load" and all that, that's all regular truck jargon.

14 Q. So some of these activity codes are what you call "Wal  
15 talk," Wal-Mart talk; is that correct?

16 A. Yes.

17 Q. And part of a mentor is you're explaining what these mean  
18 and how to use them?

19 A. Yes, I am.

20 Q. Prior to these activity codes -- I've heard the term  
21 "backhaul." Have you ever heard that term?

22 A. Yes, I have.

23 Q. And was backhaul an old activity code that they used?

24 A. That was -- yes. That was -- you know, back when I first  
25 started, it was called -- everything was just a backhaul.

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1 And what a backhaul is is I pick up a load of general  
2 merchandise, freight at our warehouse, and I deliver it to a  
3 store, and then I leave there and go to a vendor and pick up a  
4 load to take it back.

5 So that's where that term "backhaul" -- so whenever I haul  
6 something back to the distribution center from -- it could be a  
7 load of TVs from Sony or dog food or --

8 Q. Whatever --

9 A. -- Pepsi.

10 Q. Do you know when the activity codes shown in Exhibit 619  
11 came into effect, approximately?

12 A. These here?

13 Q. Yeah, those.

14 A. I'm not -- I'm not sure of the years. 2000-something. I  
15 don't know if it was 2005 or --

16 Q. Is it --

17 A. -- '6, '4. Yeah.

18 Q. So whenever they came in, did it simplify the activity  
19 codes that the drivers had to use?

20 A. I believe it did, yes. Because like they say, a hook is a  
21 hook and a drop is a drop. And that was -- it just makes it  
22 easier, you know. So you hook up your trailer, you know what  
23 you're doing.

24 Q. Okay. And you know you're getting a certain amount of pay  
25 for --

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1 A. That's correct.

2 Q. -- the activities around that; is that correct?

3 And in describing the activity codes and how they worked  
4 to these mentees that you had, were any of them inexperienced  
5 drivers driving for the first time?

6 A. No. No. They're -- pretty much Wal-Mart picks veteran.  
7 We might -- I think the minimum is three years experience, and  
8 most of the time -- I'm trying to think of the guy with the  
9 least experience I've seen. He's been there maybe six years or  
10 seven. So . . .

11 Q. And in your experience, do Wal-Mart drivers tend to stick  
12 around for a long time once they're trained?

13 MR. WAGNER: Objection. Relevance and lacks  
14 foundation.

15 THE COURT: Well, you can ask him about the drivers he  
16 knows. I don't think --

17 BY MS. CONWAY:

18 Q. And the drivers you know, have they been around Wal-Mart  
19 for a long time?

20 A. Most of them stay until they retire or passed away.

21 Q. Okay. When you're training these new mentees, do you talk  
22 about waiting 45 minutes for loads?

23 A. Well, that's part of what you explain to them, the --  
24 the -- that waiting part is actually -- you're already paid for  
25 that, because you're paid to arrive, you're either paid to hook

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1 or you're paid a live load, and that covers 45 minutes.

2 If you're only there 30 minutes, you still get the same  
3 money, and if you're in L.A., they throw another 6 bucks on  
4 there. They call it regional pay, and that's supposed to help  
5 absorb some of the traffic problems that we have.

6 So you get the arrive, you get the load, and you get the  
7 6 bucks. And if you're there for 40 minutes, that's what you  
8 get; if you're there for 30 minutes, that's what you get; if  
9 you're there for an hour, after the 45 minutes, they put you on  
10 unscheduled time. You start getting paid by the hour for every  
11 minute after that 45 minutes.

12 So you're -- you're getting paid for actually the whole  
13 time you're there.

14 Q. Have you ever received unscheduled time?

15 A. Yes, I have.

16 Q. And unscheduled time, according to the chart, is \$14 an  
17 hour; is that correct?

18 A. That's the pay, yes.

19 Q. Have you ever talked about how the activity codes work  
20 with Farris Day?

21 A. Yeah. I've known Farris Day for probably six, seven years  
22 before I went to work at Wal-Mart. We drove tanker trucks in  
23 Bakersfield for two different companies, so we had -- we  
24 interlooped together quite a bit.

25 Q. And have you explained to him how the 45 minutes --

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1     **A.**    Yeah.  He was --

2     **Q.**    -- of waiting was covered by activity codes?

3     **A.**    He was like a lot of drivers.  They assumed that they  
4     weren't getting paid for those 45 minutes.  He used to get  
5     upset about it.  He said, "Oh, I can't believe that Wal-Mart  
6     make me wait 45 minutes and not pay me."

7           And I tried to explain to him, I said, "You got this, you  
8     got that, and then you get more money after that," and it  
9     seemed like he understood.  Then it wouldn't be a month later  
10    he'd be in the break room complaining, "I was at this backhaul  
11    for two hours.  I don't know why I got to wait 45 minutes for  
12    nothing."

13           And at some point, I just decided he didn't -- either he  
14    didn't want to understand it or he just -- it didn't register.  
15    I don't know.

16    **Q.**    What types --

17    **A.**    Not just him, other people, too.

18    **Q.**    Okay.  And what types of routes have you driven at  
19    Wal-Mart?

20    **A.**    Up into Oregon, Washington, Idaho, Utah, Colorado, Texas,  
21    Arizona.

22    **Q.**    We've heard of ADP.  What is your ADP?

23    **A.**    What is mine?

24    **Q.**    Yes.

25    **A.**    Mine right now is about \$390 a day.

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1 Q. And how many hours a week do you tend to work?

2 A. It's -- it varies between 55 and 63.

3 Q. And do you determine how many hours you work?

4 A. Yes.

5 Q. How do you maximize your pay?

6 A. I call it time management. You try to be like, you know,  
7 doing two things at the same time that give you some type of  
8 pay.

9 So you're a live backhaul, and while you're getting paid  
10 to load that live backhaul and you're going to be there for an  
11 hour, hour and a half, that's a good time to go ahead and take  
12 your lunch break, and then you get paid for your lunch break at  
13 the same time. So you're getting paid two different types of  
14 activity at the same time.

15 So that's -- that's why I try to mentor. I try to show  
16 these guys a way that they can kill two birds with one stone  
17 and kind of increase their ability to make a little bit better  
18 paycheck.

19 Q. So just as you described the lunch, how do you go about --  
20 do you -- strike that.

21 Do you ever take ten-minute rest breaks?

22 A. Yes.

23 Q. And how do you go about taking your ten-minute rest  
24 breaks?

25 A. Usually, when I do those, I just -- I'll be at a store and

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1 I just -- I'll put the trailer in the dock, grab the other  
2 trailer, and then just park the truck, and then I'll go over to  
3 McDonald's just to get a Coke, go in the store and go to the  
4 bathroom.

5 Just -- I got a back problem sometimes, so I just feel  
6 like walking around for ten minutes just to kind of get the  
7 kink out of it and maybe 15 minutes to go back in the truck and  
8 then leave.

9 **Q.** At the time that you're taking your ten-minute rest break,  
10 are you receiving any activity code?

11 **A.** Well, I'm at the store, so I've already got the -- I got  
12 the arrive, I got the hook, and if I'm in L.A., I got the \$6  
13 regional pay. So, yeah, if I do that all in conjunction, I  
14 would guess, yeah.

15 **Q.** So when you take a rest break, you take it when you are  
16 doing the activity of arrive?

17 **A.** Yes. Yes.

18 **Q.** And you take -- you also take rest breaks when you're  
19 doing the activity of a hook and a drop?

20 **A.** Well, after I get done with the hook and the drop, then I  
21 go take my ten-minute break at the -- yeah, before I leave.

22 **Q.** Do you also take rest breaks when you're doing the live  
23 load?

24 **A.** A lot of times on the live load I'll take my lunch breaks.

25 **Q.** Okay. Because it's a longer time?

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1     **A.**     Correct.  It's usually -- most live loads take right at an  
2     hour or better, so you're going to be able to get your  
3     30-minute plus lunch break in in a live load.

4     **Q.**     And if most live loads take an hour, you're also getting  
5     15 minutes of unscheduled time?

6     **A.**     That is correct.

7     **Q.**     And you get that time until your wheels are rolling again;  
8     is that correct?

9             **MR. WAGNER:**  Objection.  Leading.

10            **THE COURT:**  Sustained.

11     **BY MS. CONWAY:**

12     **Q.**     When does the unscheduled time stop?

13     **A.**     The unscheduled time stops when you depart, when you leave  
14     the facility.

15     **Q.**     At the beginning of your week, which code is the first  
16     code that you receive when you leave the distribution center?

17     **A.**     It would be the hook.

18     **Q.**     And to do a hook, do you have to do an inspection?

19     **A.**     Yes.

20     **Q.**     How long does it take for you to do an inspection?

21     **A.**     A couple of minutes.

22     **Q.**     A couple of minutes?

23     **A.**     Uh-huh.

24     **Q.**     And what do you do to do an inspection?

25     **A.**     You hook the truck up, obviously, and you put the -- put



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1 all the lights on, four-way flashers. You hook the air lines  
2 up. You charge the trailer with air. You put the light cord  
3 in so you've got electricity to the trailer.

4 **THE COURT:** Slow down.

5 **THE WITNESS:** You hook the air lines up so it charges  
6 the trailer with air, hook the electric line up to give it  
7 lights, and then you get your tire bumper and you walk around  
8 and make sure all the tires got air in it.

9 You make sure the fifth wheel is connected. That's where  
10 the trailer hooks up. You make sure the door is closed, there  
11 is a seal on it, put a lock on it.

12 And you walk up the other side, you look up and down the  
13 trailer, make sure there's no holes in it, just looking for  
14 damage. And you might look on the truck and make sure you're  
15 not leaking any motor oil, and you're about ready to go.

16 **BY MS. CONWAY:**

17 **Q.** And that entirely takes you a few minutes; is that  
18 correct?

19 **A.** Yes. A couple minutes.

20 **Q.** And do you actually check -- touch the lug nuts on the  
21 truck when you're doing that inspection?

22 **A.** No. When you're -- when I'm looking at -- when I'm doing  
23 my pre-trip walking around, you're looking at the whole wheel  
24 and you don't actually have to touch the lug nuts. You're  
25 looking for, like, oil seepage. If maybe there is a wheel seal

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1 out, it will show oil.

2 And if there's a lug nut loose, the dust from the brakes  
3 actually find a way to seep through that lug nut, and so you  
4 can actually -- you can actually see it. It looks like a  
5 little vein coming out from the lug nuts. That's what you're  
6 really looking for.

7 You don't -- these lug nuts are put on with an impact  
8 wrench, so unless it's completely a hundred percent loose,  
9 grabbing them and touching them ain't going to tell you  
10 nothing.

11 So that's what you're looking for. You're looking for  
12 that little seepage, and that would give you a sign that that's  
13 loose. The only time I'd actually grab a lug nut would be if  
14 they'd taken a tire completely off and put it back on as a  
15 flat. Then you might say, "Well, make sure he got them all,"  
16 or if they took all the tires off and did a brake job and then  
17 they put the tires back on, you might check.

18 But other than that, checking the lug nuts is -- just  
19 doesn't have to happen.

20 **Q.** So in your 45 years of experience, other than those two  
21 examples you gave, you do not touch the lug nuts when you do an  
22 inspection; is that --

23 **A.** I never have. I have never had one come off, either,  
24 so . . .

25 **Q.** Okay. And back to the rest breaks, we talked about your

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1 taking ten minutes during certain activities.

2 How do you log that time?

3 A. Just stay on duty.

4 Q. And is that a Wal-Mart requirement, that you log it on  
5 duty?

6 A. No, it's not. I think it's either/or. I think the log  
7 gives you the -- you can either log it off duty or on duty. I  
8 think you have the choice there for DOT.

9 Q. And when you're taking those ten-minute breaks, are those  
10 uninterrupted breaks?

11 A. Yes. I'm usually -- like I said, I'm off walking off  
12 someplace by myself, go get a soda pop or something like that.  
13 So . . .

14 Q. When you're doing that first hook and depart of the week,  
15 do you talk to the driver coordinator?

16 A. Yeah, for -- just enough to get my paperwork.

17 Q. And how much time do you talk with the driver coordinator  
18 to get your paperwork?

19 A. Just -- they all know each other, so you walk up and they  
20 know who I am. They just reach over and get the paperwork, and  
21 then their job is to tell you where you're going, what time you  
22 have to be there, and what trailer you're pulling.

23 And they sign that and they hand you the paperwork, and  
24 that's it.

25 Q. Do you have to get that paperwork in order to do a hook

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1 and a drop?

2 A. You have to have the paperwork in hand, usually, before  
3 you go out and do that so you know what trailer to hook up to.

4 Q. And how much time does it take you to get that paperwork?

5 A. A minute, unless you're socializing. You can stand there  
6 all day, but . . .

7 Q. But that's your choice?

8 A. That's your choice, yes.

9 Q. At the end of the trip, do you also talk to -- with the  
10 driver coordinator?

11 A. You can, but when you end your trip, all you got to do is  
12 bring your paperwork and put it in the basket on her desk. You  
13 don't have to say nothin', you just [indicating].

14 The only time you have to talk to her or him is if you're  
15 going back out on another load, so you turn in that paperwork  
16 and then you ask her for your next -- your next assignment.

17 Q. Let's talk about your layovers for a few minutes.

18 Do you lay over on your trips when you're driving --

19 A. Yeah. When you run out of hours, you're -- the law says  
20 we can work 14 hours a day, drive 11, and after that we have to  
21 take a 10-hour break. That's mandated by the federal  
22 government. So when you get to that point, you have to shut  
23 the truck down and take ten hours off.

24 Q. And what do you usually do on your layovers?

25 A. I don't know if it's doctor's order or his advice. I go

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1 walking. I park the truck, do my post-trip. Then I go off  
2 duty for my -- start my ten-hour break.

3 And I put my earphones on, call a family member --  
4 usually, it's my wife -- and I'll walk for about a half an hour  
5 while I'm talking on the phone to my wife.

6 **Q.** How long have you been doing the walking?

7 **A.** Probably about five years now.

8 **Q.** And you mentioned you talk to your wife.

9 How long have you been married?

10 **A.** It will be 45 years in May.

11 **Q.** Do you have any children?

12 **A.** Four.

13 **Q.** How many grandchildren?

14 **A.** Sixteen.

15 **Q.** Before taking a layover, do you ask anyone for permission  
16 to take that layover?

17 **A.** No.

18 **Q.** Have you ever laid over at home?

19 **A.** A couple of times.

20 **Q.** Did you ask someone for permission prior to laying over at  
21 home?

22 **A.** You don't ask for permission, but you let them know where  
23 you're at.

24 **Q.** Why would you let them know where you're at?

25 **A.** Well, when I first started, that's what was explained,

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1 that if you're going to leave the truck, they just want to know  
2 where the truck is at in case something happens to it.

3 And you can have an electrical fire and the truck catches  
4 on fire -- most of the store managers know when there's a  
5 Wal-Mart truck parked in the parking lot, there's a driver in  
6 there sleeping.

7 And so it's just like, you know, if something happened to  
8 that truck, you know, you have the fire department out there  
9 trying to rescue somebody out of the truck and there's nobody  
10 in it. So it's just a good idea to just let them know, "I'm  
11 going home and my truck -- this is where my truck is at," so if  
12 anything was to happen to it, they're aware that there's nobody  
13 there, but they know where the truck is.

14 So you're not -- you're not asking for permission. You're  
15 just, you know, staying in touch with your -- with your people  
16 about, you know, what you're doing and where your equipment's  
17 at.

18 **Q.** Has Wal-Mart ever asked you to be a security guard in  
19 reference to the truck?

20 **A.** Excuse me?

21 **Q.** Has Wal-Mart ever asked you to be a security guard in  
22 reference to the truck?

23 **A.** No. I -- no.

24 **Q.** Do you do any Wal-Mart work during your layovers?

25 **A.** Not -- none whatsoever.

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1 Q. Do you do any work during your layovers?

2 A. No. If you call talking work -- no. There is no work  
3 done at all.

4 Q. And does Wal-Mart tell you how much time you have to spend  
5 in the sleeper berth?

6 A. No. You just -- you have to have a combination of off  
7 duty and sleeper berth that equals 10 hours, and then --

8 Q. And that's totally up to you?

9 A. Correct.

10 Q. Have you ever stayed in a hotel on a layover?

11 A. Yes, I have.

12 Q. In what circumstances?

13 A. Well, whenever you're mentoring, of course, there's two  
14 people in the truck, so you have to go get a motel.

15 And both of us -- when I'm mentoring, the person I'm  
16 training, he gets the 42 bucks or she gets the 42 bucks and  
17 Wal-Mart pays for the motel. While I'm mentoring, I get ADP,  
18 so that would include all the money I make for the day.

19 Q. And have you ever slept in a hotel when you were not  
20 mentoring?

21 A. Yes, I have.

22 Q. And can you tell the jury the circumstances and how you  
23 were paid.

24 A. Well, there's several reasons why, but the one that  
25 happened to me was I'm a nonsmoker and the -- my truck was

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1 broke down. They assigned me to a smoking truck and they said  
2 I could wait for another truck, but I said, "I'll be all right.  
3 I'll spray some, you know, Fabreze or whatever."

4 And it was okay until I went to go to sleep, and then the  
5 odor of that cigarette truck was giving me a headache, so I  
6 just went and got a motel room, and they give me my 42 bucks  
7 and they paid for the motel room for three nights.

8 **Q.** Are there any limitations on what you can carry in your  
9 truck?

10 **A.** As far as what?

11 **Q.** Can you carry alcohol in your truck?

12 **A.** Oh, no.

13 **Q.** In the cab?

14 **A.** No. No alcohol in the truck is allowed.

15 **Q.** Are you allowed to drink alcohol on a layover?

16 **A.** Well, if I want to drink alcohol on my ten-hour layover,  
17 that's entirely up to me. There's a federal laws that fall  
18 into place about how much time you have to take off after  
19 you've had a drink, but there's nothing that says I can't. I  
20 just have to fall into that -- I think it's a minimum of eight  
21 hours after the last drink before you can move again.

22 So . . .

23 **Q.** And so you comply with that --

24 **A.** Oh, yeah. I can go -- I could go to a restaurant and have  
25 a beer or something with my dinner if I chose to.



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1 Q. Are you allowed to have pets in your truck?

2 A. No.

3 Q. And do you have any feeling as to why that -- why that  
4 would be?

5 A. Well, I've got my own personal feelings. I think, you  
6 know, animals create their own odors, so the truck is a small,  
7 confined area and you keep a truck in there for five or six  
8 days -- or a dog or a cat or whatever, it's going to -- it's  
9 going to start smelling like a doghouse. It's going to shed  
10 fur, so they're going to create allergies for somebody else  
11 that might have to drive the truck.

12 And then my biggest concern is, you know, dogs have to go  
13 to the bathroom just like people, so where do you take your  
14 dog? I mean, you know, you're not at your house, you're at  
15 somebody else's property and you're -- you know, not everybody  
16 carries rubber gloves with them, so that creates a whole other  
17 mess, too.

18 Q. Okay. You don't think it's an inconvenience that you  
19 can't have a pet in your tractor; is that correct?

20 A. No.

21 Q. Let's talk about for a few minutes washing your tractor.

22 The first 20 years of your employment at Wal-Mart, did you  
23 ever wash your tractor-trailer?

24 A. I never did.

25 Q. Did you ever get disciplined for not washing your

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1 tractor-trailer?

2 A. Never once.

3 Q. Did any -- did you have anyone tell you you had to wash  
4 your tractor?

5 A. No.

6 Q. And is it your habit now to wash your tractor?

7 A. In the last five years, I just now started washing my  
8 truck. So . . .

9 Q. And what made you change?

10 A. The trucks that Wal-Mart bought when I first -- they were  
11 just work trucks. They're just -- they're not like dolled up  
12 or customized, so I just didn't feel like I just wanted -- I  
13 kept the inside clean. The outside didn't matter. I said,  
14 "It's your truck, you wash it."

15 And then they started buying these more classic-looking  
16 trucks. They got polished wheels from the factory and all that  
17 and it's -- they're real nice-looking trucks, what I was used  
18 to driving before I came to Wal-Mart.

19 And so I said, "You know what, I'm going to go out and get  
20 me some chrome, put some stuff on it, and I'm going to take a  
21 little bit more care of this truck." So it's my decision.

22 Q. And have you observed whether there is other drivers that  
23 don't wash their truck?

24 A. Oh, there's a lot of them that don't. There's probably  
25 more that don't than do.

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1 **Q.** Okay. And we've been hearing a lot of testimony about  
2 trucks.

3 I mean, there's a tractor portion of a truck and a trailer  
4 portion; is that correct?

5 **A.** Correct.

6 **Q.** And so when I talk about washing your truck, is it just  
7 the tractor portion?

8 **A.** Yes, just the tractor. I don't wash the trailer.

9 **Q.** Okay. And in your observations of what other drivers do,  
10 do most other drivers only wash the tractor portion?

11 **A.** Yes.

12 **MR. WAGNER:** Objection.

13 **THE WITNESS:** On rare occasion, you might see someone  
14 pull through --

15 **THE COURT:** Wait. Wait.

16 **MS. CONWAY:** Okay. Sorry.

17 **THE COURT:** You got to stop while I hear the  
18 objection.

19 **THE WITNESS:** Oh.

20 **MR. WAGNER:** Objection. Relevance and lacks  
21 foundation and leading -- not relevance. Leading and lacks  
22 foundation.

23 **THE COURT:** It's leading, so I will sustain.

24 **BY MS. CONWAY:**

25 **Q.** Okay. Have you had the opportunity to observe other

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1 drivers washing their trucks while you're washing your truck?

2 A. Yes.

3 Q. And in your observations, do the majority of drivers just  
4 wash their tractors?

5 A. Yes.

6 Q. In your 45 years of experience with Wal-Mart, you've never  
7 washed your trailer; is that correct?

8 A. I have never washed a trailer ever.

9 Q. How long does it take for you to wash the tractor?

10 A. The -- they bought a -- it's like a -- what they call --  
11 like a car wash. You just drive it in. It's got brushes and  
12 all that just like a car wash. You drive in and there is a  
13 red/yellow/green light, so when you get up to the spot so the  
14 computer knows what to do, it has a red light. Set the brakes,  
15 get out, push a button, get back in the truck. It takes seven  
16 minutes and it brushes it, sprays it, and you're done.

17 Q. What -- when do -- excuse me. When do you wash your  
18 tractor?

19 A. I usually try to wash it at the beginning of the week in  
20 between coming back into the yard and going back out.

21 Q. During the time that you're --

22 A. Yeah.

23 Q. -- doing a hook and a depart?

24 A. Correct.

25 Q. And how often do you now wash your tractor?

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1     **A.**    I try to wash it once a week, but it could be -- you know,  
2     it just depends on the weather, if you felt the truck was  
3     dirty.

4            If I come into the yard and there is two or three trucks  
5     waiting in line, then I just won't do it until the next day,  
6     and then sometimes there is not the next day, until the next  
7     week. But I'd say that probably three times a month is about  
8     what I'm at right now.

9     **Q.**    Do you always wash your tractor when you're getting  
10    another activity code?

11    **A.**    Yes.

12    **Q.**    And we've heard some testimony in this case about tomato  
13    season.

14            Do you know what tomato season is?

15    **A.**    I have lived it.

16    **Q.**    And what -- when did you live tomato season?

17    **A.**    Back in the '70s, it was probably one of the filthiest  
18    things that went on. The guys that would haul bulk tomatoes,  
19    there's a -- the tomatoes would bounce and they start creating  
20    a juice in their own -- their own liquid, and they leaked.

21            And then sometimes the driver would actually pull the  
22    drains and drain the liquid out, because they got to the tomato  
23    cannery, they have to drain the tubs before they unload the  
24    tomatoes so they're trying to save time.

25            So they were spreading tomato juice up and down all the

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1 highways all over, and when you drive on that same highway, it  
2 was like -- it's almost like the first rain. I don't know if  
3 you understand, the first rain, how you get that black kind of  
4 soot on your -- on your vehicle.

5 So the tomato juice would mix up with the road oil and it  
6 had like just this nasty coating all over your truck and it was  
7 just -- and it would draw flies. You would park your truck,  
8 you'd have a million flies around it. And it created a big  
9 mess with everybody.

10 Q. And at some time -- point, did that stop -- that tomato  
11 season problem stop?

12 A. You don't have that problem no more.

13 Q. Okay. When --

14 A. I don't -- I --

15 Q. You mentioned --

16 A. I'm trying to think. It probably quit back in the '90s.

17 Q. You believe that stopped in the '90s?

18 A. Yeah. I think the Highway Patrol started writing them up  
19 for drop -- because you can have clear water leak out of your  
20 truck and that's it, and this is not clear water. So I think  
21 they started citing them for hazardous and the problem just  
22 kind of just disappeared.

23 Q. Have you ever heard the term "truck check"?

24 A. No, I haven't.

25 Q. Has anyone at Wal-Mart ever disturbed you in the middle of

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1 your ten-hour layover?

2 **A.** No.

3 **MS. CONWAY:** Just a minute, please.

4 (Defense counsel confer off the record)

5 **MS. CONWAY:** For identification, I would like to show  
6 Mr. Martin Defendant's Exhibit 689.

7 Can I approach the witness, Your Honor?

8 **BY MS. CONWAY:**

9 **Q.** Do you recognize this document?

10 **A.** It's got my writing all over it.

11 **Q.** Is this a trip sheet you filled out?

12 **A.** Yes. It's what we call a manual trip sheet.

13 **Q.** Okay. And is -- it's your handwriting on it?

14 **A.** Yes, it is.

15 **Q.** And does this demonstrate a trip that you had when you  
16 were working at Wal-Mart as a private driver?

17 **A.** Correct. This was from April of last year.

18 **Q.** Okay.

19 **MS. CONWAY:** Your Honor, we would move to enter into  
20 evidence and publish Exhibit 689.

21 **THE COURT:** Any objection?

22 **MR. WAGNER:** Hearsay. Yes. Hearsay.

23 **THE COURT:** Do you want to lay a business record  
24 foundation?

25 **MS. CONWAY:** Sure.

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1     **Q.**    Are you required to fill out trip sheets as part of your  
2     job?

3     **A.**    Yes.    Every trip we're on has a trip sheet attached to it.

4     **Q.**    And you mentioned that this is your trip sheet.

5         Did you --

6     **A.**    Yes, it is.

7     **Q.**    Did you fill it out accurately?

8     **A.**    Yes --

9     **Q.**    And --

10    **A.**    -- I did it.

11    **Q.**    And is this part of the paperwork you turned in?

12    **A.**    Correct.

13    **Q.**    And in looking at this trip sheet, does it look like a  
14    accurate portrayal of the trip that you took in April of this  
15    year?

16    **A.**    Yes, it does.

17           **MS. CONWAY:**   I would again move, Your Honor.

18           **MR. WAGNER:**   That's fine.

19           **THE COURT:**   It will be received.   Thank you.

20           (Trial Exhibit 689 received in evidence).

21    **BY MS. CONWAY:**

22    **Q.**    For the record, this trip sheet was referred to in the  
23    opening statements in this case, and in looking at this trip  
24    sheet, does this accurately reflect the various activity codes  
25    that you received on this April trip?



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1     **A.**     Yeah. That's the codes I was using. That's the ones I  
2     put down.

3     **Q.**     And does it also accurately reflect the times that you  
4     left the various locations?

5     **A.**     Yes, it does.

6             **MS. CONWAY:** No further questions. Thank you,  
7     Mr. Martin.

8             **THE COURT:** Thank you.

9             I think we'll take our morning recess at this time,  
10    Mr. Wagner. Is that okay?

11            **MR. WAGNER:** Thank you.

12            **THE COURT:** All right. Ladies and gentleman, we'll  
13    take a morning recess at this time. If you would be ready to  
14    come back, please, at 20 minutes until 11:00.

15            In the meantime, please don't speak with each other or  
16    anyone else or make up your minds. We are near the end of the  
17    case, but you have not heard all the evidence yet.

18            (Proceedings were heard out of presence of the jury:)

19            **MR. EDELMAN:** Your Honor, one quick issue to raise.

20            **THE COURT:** All right.

21            **MR. EDELMAN:** I don't think that Mr. Saltzman did this  
22    on purpose because I don't think he was involved in the case at  
23    the time -- neither was I -- but there was a line of  
24    questioning by him of Dr. Walker about the suggestion that --  
25    well, he was suggesting to the witness that it was the

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1 plaintiffs who went to counsel, rather than vice versa, and  
2 back and forth on that.

3 And --

4 **THE COURT:** And the bottom line was the witness had no  
5 idea either way about anything.

6 **MR. EDELMAN:** Well, the --

7 **THE COURT:** And you objected to the question and I  
8 sustained the objection.

9 What is your point?

10 **MR. EDELMAN:** Well, he asked several questions which  
11 suggested that the plaintiffs contacted the plaintiffs' counsel  
12 and, in fact, the opposite happened in this case, because --

13 **THE COURT:** Well, I do not believe that that is a  
14 relevant fact. There certainly is no evidence in this record  
15 so far about it, and if you propose to put that in, then I will  
16 take arguments from counsel about whether that's a relevant  
17 matter.

18 **MR. EDELMAN:** Well, I didn't want to put it, in and  
19 that's why I stopped. I was --

20 **THE COURT:** I don't know why he asked those questions,  
21 frankly, but he got no responses to them.

22 **MR. SALTZMAN:** Right.

23 **THE COURT:** So . . .

24 **MR. SALTZMAN:** I think it's over and done.

25 **MR. EDELMAN:** Well, okay. I just -- you know, I

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1 purposely did not go further because I did not want to talk  
2 about any orders that the Court made, because that's clearly  
3 been the instruction to us. So I stopped.

4 But what happened in this case, as you may recall, is that  
5 you ordered them to -- you ordered Wal-Mart to give them a list  
6 of all the class members, because they had lost their  
7 plaintiffs, who had died or retired or whatever, and they then  
8 took the list and they went out and they selected the  
9 plaintiffs. It was the opposite of a random process and it was  
10 the opposite of the -- anybody approaching them. They went and  
11 picked the group.

12 **THE COURT:** Yeah, but your witness' random discussion  
13 was only about how -- regardless of how they're chosen, if  
14 they're not chosen randomly, then you can't use them  
15 statistically to make -- and he said that several times at some  
16 length, actually, and he didn't know anything about what  
17 Mr. Saltzman was asking him.

18 **MR. EDELMAN:** Well, I know he didn't.

19 **MR. SALTZMAN:** But on the random issue, no matter  
20 which way it came down, it's still the same answer. It's not  
21 ran -- random is not an issue. So he didn't know anything  
22 about that.

23 **THE COURT:** In any event, if you're requesting to, I  
24 don't know, reopen and put in evidence about that, I will not  
25 grant that request.

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1           **MR. EDELMAN:** Okay. And -- okay.

2           **MR. SALTZMAN:** Thank you, Your Honor.

3                           (Recess taken at 10:28 a.m.)

4                           (Proceedings resumed at 10:48 a.m.)

5           (Proceedings were heard out of presence of the jury:)

6           **THE COURT:** Are you ready?

7           **MR. WAGNER:** Yes, Your Honor.

8           **THE COURT:** All right.

9           (Proceedings were heard in the presence of the jury:)

10          **THE COURT:** All right. Mr. Wagner, you may proceed.  
11          And you are still under oath from this morning, sir.

12          **MR. WAGNER:** Good morning, Your Honor.

13          Good morning, ladies and gentleman.

14                           **CROSS-EXAMINATION**

15          **BY MR. WAGNER:**

16          **Q.** Okay. Mr. Martin, hi.

17          **A.** How you doing?

18          **Q.** I'm Butch Wagner. I'm one of the attorneys for the -- for  
19          the class members, your fellow truck drivers. Okay?

20                 I -- you made some statements here that you thought you  
21          were well paid; right?

22          **A.** Correct.

23          **Q.** Okay. How familiar are you with California wage laws as  
24          they would apply to a person like you?

25          **MS. CONWAY:** Objection, Your Honor. Calls for a legal

1 conclusion.

2           **THE COURT:** Calls for a yes or a no -- or, actually,  
3 it doesn't call for a yes or a no, it's a gradation. So  
4 perhaps you could change it to a yes or a no.

5 **BY MR. WAGNER:**

6 **Q.** Do you consider yourself to be fairly familiar with the  
7 California wage laws as they apply to a driver -- a truck  
8 driver like yourself?

9 **A.** Not really.

10 **Q.** Okay. Well, are you aware that you're entitled to a paid  
11 ten-minute rest break every four hours under the law?

12           **MS. CONWAY:** Objection, Your Honor. Calls for a legal  
13 conclusion.

14           **THE COURT:** Sustained.

15 **BY MR. WAGNER:**

16 **Q.** Well, did anyone ever tell you that you were entitled to a  
17 ten-minute paid rest break every four hours you work?

18 **A.** Yes --

19           **MS. CONWAY:** Same objection, Your Honor.

20           **THE COURT:** Well, no, it's not a legal conclusion.  
21 You may answer.

22           **THE WITNESS:** Am I aware of the fact that I have a  
23 right to one of those? Is that what you're asking me?

24 **BY MR. WAGNER:**

25 **Q.** No. Has anyone ever told you that you have a right to

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1 take a ten-minute off-duty rest break every four hours and get  
2 paid for it?

3 **A.** Yes, I've heard that law. I -- yes, I have heard about  
4 that --

5 **Q.** Okay.

6 **A.** -- yes.

7 **Q.** All right. Did anyone at Wal-Mart ever tell you that?

8 **A.** That, I don't remember.

9 **Q.** All right. Now, you drive --

10 **MR. WAGNER:** Can we -- Tracy, can we get Mr. ELMO  
11 going? Thank you.

12 **BY MR. WAGNER:**

13 **Q.** You drive all over the state; correct?

14 **A.** That's correct.

15 **Q.** Okay. Where do you -- where is your distribution center?  
16 Did you say Porterville?

17 **A.** Yes, Porterville, California.

18 **Q.** That's right here; right? And in --

19 **A.** Yes, just north of Bakersfield, south of Fresno.

20 **Q.** Right. So -- and you drive all over the state; correct?

21 **A.** Yes.

22 **Q.** So when you're on the road here, let's say, somewhere on  
23 Highway 5 or 99 and you think you need a -- you feel like you  
24 need a rest break for whatever reason, use the restroom, get  
25 some coffee, stretch your legs, and you take your rest break,

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1 you're not taking that rest break in conjunction with any other  
2 paid activity, are you?

3 **A.** I myself personally normally don't take my breaks in those  
4 type of situations. I usually try to take my breaks at a place  
5 where there's a restaurant or a store, usually, like I said, in  
6 conjunction with something else I'm doing --

7 **Q.** But when you --

8 **A.** -- with my job.

9 **Q.** But when you do take it on the road --

10 **A.** Uh-huh (affirmative).

11 **Q.** -- and you're not at a distribution center, you -- you're  
12 not taking that in connection with any other activity, are you?

13 **MS. CONWAY:** Lacks foundation, Your Honor.  
14 Argumentive.

15 **THE COURT:** Overruled.

16 You can answer.

17 **THE WITNESS:** What I said earlier and what I'm saying  
18 right now is when I take my breaks, it's usually when I'm at a  
19 store doing some type of activity. I don't usually ever  
20 stop -- unless I've got the runs, I don't stop on I-5 in the  
21 middle of nowhere to take any break.

22 **BY MR. WAGNER:**

23 **Q.** But sometimes you do; right?

24 **A.** No.

25 **Q.** Okay.

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1     **A.**    I said unless I have the runs. Unless I'm sick, I  
2     normally do not plan my day to stop in the middle of nowhere.  
3     That would only be a rare occasion for me, would be if I had  
4     some type of medical situation where I needed to get off the  
5     road for a few minutes.

6     **Q.**    But are you aware that other drivers do that --

7     **A.**    Oh, absolutely. There is people that stop in places they  
8     probably shouldn't, but, yes, they do.

9     **Q.**    Okay. Now, you mentioned earlier that you -- when you run  
10    out of time, either because you've worked 14 hours that day or  
11    driven 11, you have to stop and take your layover; right?

12    **A.**    That's correct.

13    **Q.**    And you take your layover all over the state; correct?

14    **A.**    Yes.

15    **Q.**    All right. So when you run out of time, you say you stop  
16    the truck and you -- that's when your ten-hour layover period  
17    starts; right?

18    **A.**    Well, after you do your post-trip and finish your  
19    paperwork up.

20    **Q.**    So when you stop the truck, you're not getting paid for  
21    mileage anymore then; right?

22    **A.**    That would be correct.

23    **Q.**    And then you do your layover period -- then you do --  
24    excuse me -- you do your post-trip inspection somewhere at some  
25    truck stop; right?



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1     **A.**    Or, yeah, wherever you're parked at.

2     **Q.**    Okay. And you're not getting paid for that post-trip  
3     inspection --

4     **A.**    Well, I was getting paid -- it's --

5     **Q.**    What?

6     **A.**    You -- you -- you haven't quit working. You've drove into  
7     that point. So that would be part of your driving --

8     **Q.**    Well, when you're --

9     **A.**    -- because you --

10    **Q.**    -- doing your post-trip inspection, you can't be driving.

11    **A.**    No, you can't be driving, but you're -- you're -- you  
12    finish driving at that point, you spend a couple minutes doing  
13    a post-trip, and then you're done.

14    **Q.**    And so --

15    **A.**    It's not -- it's not a big, long, drawn-out process.

16    **Q.**    But however long it takes, you're not getting paid for  
17    that; right?

18    **A.**    It just depends on your termination. Again, I got paid to  
19    drive to that point, so I incorporated it with the driving.

20    **Q.**    Okay. But once you're -- but you can't possibly be  
21    getting -- be getting mileage pay when you're doing a post-trip  
22    inspection; right?

23    **A.**    No.

24    **Q.**    Okay. Same way with the pre-trip inspection when you get  
25    up in the morning?

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1     **A.**    Well, yeah.  You spend a few minutes checking the truck  
2     before you take off and drive.

3     **Q.**    And you're not getting paid for that, either, are you?

4     **A.**    It's incorporated with the driving.  You can't drive  
5     because the law says you can't drive until you check the truck,  
6     so it's kind of like a catch-all thing.

7     **Q.**    Right.  No, I understand that that's required, but you get  
8     paid for the driving under Wal-Mart's piece rate plan.

9     **A.**    Uh-huh.

10    **Q.**    Okay.  But you're not getting paid for the time you spend  
11    before driving doing the pre-trip inspection; correct?

12    **A.**    I guess not.

13    **Q.**    Okay.  Now, you mentioned before that -- I mean, I guess  
14    you're usually -- you almost always take your layover in the  
15    cab; right?

16    **A.**    That's correct.

17    **Q.**    And you said a couple times you took it at home; right?

18    **A.**    Yeah.  I don't go home very often to my actual house.  I  
19    usually stay in the truck.

20    **Q.**    Are you familiar with Wal-Mart's written pay manuals and  
21    reference manuals, the driver reference manuals?

22    **A.**    I -- I've probably read every one they give me, but I  
23    don't have it memorized.

24    **Q.**    Are you familiar and aware that the policy requires the  
25    drivers to get prior authorization before taking a layover at

1 home?

2 **A.** I've read it, but that's not the way it's enforced. It's  
3 acted -- it's like I said in my prior testimony, you're not  
4 asking permission to go home, you're letting them know where  
5 their equipment is at because you're not going to be there in  
6 case something happens to it. That's the whole purpose of  
7 calling. It's not for permission.

8 **Q.** Well, you're familiar with the policy that requires you to  
9 get permission to take your layover --

10 **A.** I -- like I said, I have read it in the book, but that's  
11 not how it is enforced at the company level. I mean, what they  
12 wrote and what they do obviously don't go hand in hand, because  
13 I've never had to ask permission. Nobody that I know of has  
14 asked permission to go home. They just tell them that's where  
15 they're going.

16 **Q.** And that's per --

17 **A.** And it's --

18 **Q.** And that's personal to yourself; right? What you're  
19 testifying to now, that's personal to yourself?

20 **A.** Well, I talk to other drivers. They would tell you the  
21 same things, but that would be hearsay. But . . .

22 **Q.** Okay. Have you -- have you ever received a pay bulletin  
23 or a newsletter from Wal-Mart stating that the policy regarding  
24 layovers and getting permission to take the layover somewhere  
25 other than the truck has been changed?

**HARRIS - DIRECT**

1     **A.**     No.

2     **Q.**     Okay.

3             **MR. WAGNER:** Mr. Martin, I don't have anything  
4 further. Thank you -- thank you for your time.

5             **THE COURT:** Anything further, Ms. Conway?

6             **MS. CONWAY:** Nothing, Your Honor.

7             **THE COURT:** May the witness be excused?

8             **MS. CONWAY:** He can.

9             **THE COURT:** Thank you very much, sir. You're excused.

10            **THE WITNESS:** Thank you.

11            **MS. CONWAY:** We would call -- we would read the  
12 deposition transcript portions of Ivan Harris, Your Honor.

13                            **IVAN HARRIS,**

14 called as a witness for the Defendant, having been duly sworn,  
15 was examined and testified through **DEPOSITION TESTIMONY** as  
16 follows:

17            **MS. CONWAY:** Transcript pages -- line -- page 5, lines  
18 4 to 5. Ivan Harris, having been first duly sworn, testifies  
19 as follows:

20            **"Q.** Good morning, Mr. Harris.

21            **"A.** Good morning.

22            **"Q.** All right. When did you start working for Wal-Mart?

23            **"A.** June of 2006.

24            **MS. CONWAY:** I'm sorry, lines 2 through 9 for the  
25 Court's attention.

**HARRIS - DIRECT**

1       **"Q.** What was your job when you were hired?

2       **"A.** I was hired as a truck driver.

3       **"Q.** Have you been a truck driver for Wal-Mart since June  
4       2006?

5       **"A. Yes."**

6       **MS. CONWAY:** Page 15, lines 3 to 8:

7       **"Q.** Why did you want to drive for Wal-Mart?

8       **"A.** It was real close to home and I've always heard one  
9       of the best jobs in trucking. I had already applied two  
10      times prior to that. Only like seven miles up the street  
11      from my house, and the third application somebody actually  
12      looked at it."

13      **MS. CONWAY:** Lines 18 through 25:

14      **"Q.** Have you found it to be true that it's the best  
15      company to drive for?

16      **"A.** Oh, yeah. Yeah. To me, yeah.

17      **"Q.** Why do you think so?

18      **"A.** I mean, I get along with everybody and they treat you  
19      good and I haven't had any problems.

20      **"Q.** Are you happy with your compensation?

21      **"A.** Yeah."

22      **MS. CONWAY:** Page 16, lines 21 through 25:

23      **"Q.** You're making more now as a driver than you had at  
24      other --

25      **"A.** Oh, yes, yes."

**HARRIS - DIRECT**

1           **MR. WAGNER:** Objection. Relevance. Move to strike.

2           **THE COURT:** Overruled.

3           **MS. CONWAY:** (Reading):

4           **"A.** Oh, yes, yes.

5           **"Q.** Do you think Wal-Mart pays better than other driving  
6 companies' jobs?"

7           **MR. WAGNER:** Objection. Relevance.

8           **THE COURT:** Sustained.

9           **MR. WAGNER:** Your Honor, before the answer is shown to  
10 the jury, I think we need --

11           **MS. CONWAY:** It wasn't shown. It wasn't shown,  
12 Your Honor, only the question. The answer was on the next  
13 page.

14           **THE COURT:** Okay. So that's good for that, but he  
15 makes a good point that if you are showing the whole page  
16 before he has an opportunity to object, it's there.

17           **MS. CONWAY:** I could do it this way, Your Honor. I  
18 could say the lines, he can make his objection, and then we can  
19 read it. How about that?

20           **MR. WAGNER:** And then put it on? That's fine.

21           **THE COURT:** And after that, put it on.

22           **MR. WAGNER:** Okay.

23           **MS. CONWAY:** Next, page 19, lines 18 through 25  
24 through page 20, lines 1 through 4.

25           **MR. WAGNER:** 19 what?

**HARRIS - DIRECT**

1           **MS. CONWAY:** Lines 18 through 25.

2           **MR. WAGNER:** Okay. No objection.

3           **MS. CONWAY:** Okay. Kim, it can be put on the board.

4           **THE COURT:** Sure.

5           **MS. CONWAY:** (Reading):

6           **"Q.** Do you have pride in being a Wal-Mart driver?

7           **"A.** Oh, yeah.

8           **"Q.** Why is that?

9           **"A.** I like it. It's different. It's not like an  
10          over-the-road company, you know. I don't know. It's --  
11          they're more family oriented, put it that way. If you  
12          have to get home, they get you home, and, you know, they  
13          take care of you. They have barbecues.

14          **"Q.** They care about you?

15          **"A.** Yeah.

16          **"Q.** They want to take care of you as a driver?

17          **"A.** Yeah."

18           **MS. CONWAY:** Page 36, lines 4 through 25, and page 37,  
19          lines 1 through 20.

20           **MR. WAGNER:** No objection.

21           **THE COURT:** Thank you.

22           **MS. CONWAY:** (Reading):

23           **"Q.** Do you get paid for your layovers?

24           **"A.** Yes, I do.

25           **"Q.** How much do you get paid?

## HARRIS - DIRECT

1        "A. Each layover is \$42.

2        "Q. What do you do during your layover?

3        "A. Must have at least eight hours of sleep and I go eat  
4 dinner usually, watch a movie.

5        "Q. Where do you watch the movie?

6        "A. In my truck.

7        "Q. Have you ever gone to the movies?

8        "A. I think I have maybe once.

9        "Q. While working for Wal-Mart?

10       "A. On layover, yeah, probably have.

11       "Q. Go for walks?

12       "A. Yeah.

13       "Q. So when you would go to eat, what do you do with the  
14 truck?

15       "A. I lock it up.

16       "Q. You make it secure?

17       "A. Secure it.

18       "Q. And then you leave it?

19       "A. Uh-huh.

20       "Q. What about if you go for a walk? You secure it and  
21 leave?

22       "A. Uh-huh.

23       "Q. Has anyone at Wal-Mart told you you have to stay with  
24 the truck during your layover?

25       "A. No.



## HARRIS - DIRECT

1 "Q. Have you ever taken a layover in a hotel?

2 "A. Yes.

3 "Q. Are you reimbursed for that?

4 "A. Depends on the situation.

5 "Q. When do you get reimbursed?

6 "A. If you're -- say, for instance, if your truck breaks  
7 down and they tow it, they will put you in a hotel and pay  
8 for it. Or I think I had had one where I stayed at a  
9 casino and I parked my truck right out the window and I  
10 called and said, 'I'm not sleeping in it.' I told them --  
11 I didn't push layover. They said, 'You could have. We  
12 would have paid you for it because you're still laying  
13 over.' I told them it was all right. That's about it."

14 MS. CONWAY: Page 38, lines 12 through 24.

15 MR. WAGNER: All right.

16 MS. CONWAY: Okay. Thank you.

17 "Q. What about if next week you're out for a layover and  
18 you decide you just don't want to stay in the sleeper  
19 berth? Can you get a hotel?

20 "A. Yes.

21 "Q. And pay for it yourself?

22 "A. Uh-huh.

23 "Q. Do you have to ask permission?

24 "A. No. I just have to tell them where the truck is at  
25 if I'm not sleeping. They make sure I'm parked in a

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1 secure location.

2 "Q. You make sure you're parked securely and then you can  
3 do whatever you want?

4 "A. As far as layover time. I have to sleep."

5 MS. CONWAY: Page 39, lines 2 to 3 and lines 6 through  
6 19.

7 THE COURT: Any objection?

8 MR. WAGNER: No.

9 THE COURT: All right.

10 MS. CONWAY: (Reading):

11 "Q. How many hours sleep do you need?

12 "A. I personally need only about six or seven.

13 "Q. Do you work during your layover?

14 "A. No.

15 "Q. Do you -- how many hours do you have to be on  
16 layover?

17 "A. Ten.

18 "Q. Do you know where the rule comes from?

19 "A. That's the DOT regulation.

20 "Q. The U.S. Department of Transportation?

21 "A. Yes.

22 "Q. How many hours a day can you be driving?

23 "A. You can drive 11 hours per day.

24 "Q. Where did that rule come from?

25 "A. Same regulation, Department of Transportation

## HARRIS - DIRECT

1 regulations."

2 MS. CONWAY: Page 65, lines 13 through 25.

3 MR. WAGNER: Did you say 65?

4 MS. CONWAY: I did.

5 THE COURT: Well, it's a little hard because --

6 MS. CONWAY: It refers to Exhibit A, which was one of  
7 the questionnaires, Your Honor.

8 THE COURT: Okay. All right. Any objection?

9 MR. WAGNER: No.

10 THE COURT: But you better -- they will be referring  
11 to a questionnaire.

12 MS. CONWAY: That was filled out by this particular  
13 driver.

14 "Q. I'd like to actually start with the comments on page  
15 7 at the end. It says, 'Please record any comments or  
16 clarifications of your answers here.' Can you read what  
17 you wrote, please.

18 "A. 'Each trip is different and location and situation  
19 change.'

20 "Q. What do you mean by that?

21 "A. Each trip is different. I mean, it depends where  
22 you're going, the time of day, where it's at, you know,  
23 situations behind the store.

24 "Q. Did that make it hard to answer some of these  
25 questions?

## HARRIS - DIRECT

1       **"A.** Yes."

2               **MS. CONWAY:** Page 73, lines 23 to 24 -- 25, I'm sorry,  
3 going on to page 74, lines 1 through 20.

4               **THE COURT:** Any objection?

5               **MR. WAGNER:** No objection.

6               **THE COURT:** You may.

7               **MS. CONWAY:** (Reading):

8       **"Q.** Do you think you were being paid for all of your  
9 work?

10       **"A.** Yes and no.

11       **"Q.** Okay.

12       **"A.** I have to say it that way because some -- some people  
13 believe everything that you do is pay. I'm the type of  
14 person that some things are just part of your job. So  
15 say, for instance, I have to get a live load. I've picked  
16 this trailer up from the store. It's supposed to be swept  
17 out, so I'm supposed to check it. Then I go to a vendor  
18 for a live load. The vendor says the trailer hasn't been  
19 swept out. The driver will get the okay to drive back to  
20 a location to get a clean trailer instead of sweeping it  
21 out himself to go back to the vendor. I don't -- I'm the  
22 type of person I would sweep it out at the vendor and get  
23 what I'm supposed to do.

24       **"Q.** You're getting paid for the live load time, though;  
25 right?

**HARRIS - DIRECT**

1       **"A.** Yes. But you can also write down unscheduled time  
2 and get paid for it."

3       (Loud noise interrupts the proceedings.)

4       **THE COURT:** Can you find out what that was?

5       **MR. WAGNER:** Something fell, as opposed to explosion.

6       **THE COURT:** I think so.

7       **MS. CONWAY:** Going on to more mundane issues.

8       **MR. EDELMAN:** Your Honor had warned me not to engage  
9 in theatrics, and I promise you I didn't do that.

10       **MS. CONWAY:** Page 114, lines 11 through 22 -- I'm  
11 sorry. I didn't finish.

12       **"Q.** You are getting paid for the live load time, though;  
13 right?

14       **"A.** Yes. But you can also write down unscheduled time  
15 and get paid for it. Some drivers would rather go get the  
16 miles, the extra activity pay, and hope to go back."

17       **MS. CONWAY:** 114, lines 11 through 22.

18       **THE COURT:** Any objection?

19       **MR. WAGNER:** No.

20       **MS. CONWAY:** (Reading):

21       **"Q.** Are there some weeks where you don't have to wait for  
22 a load at all?

23       **"A.** Yes.

24       **"Q.** Are there some weeks where you have to wait for more  
25 than one load?

**HARRIS - DIRECT**

1       **"A.** Yes.

2       **"Q.** Is it possible to estimate how many weeks are no wait  
3 versus --

4       **"A.** You know, it's hard to estimate because I might only  
5 have one live load the whole week, might have none for a  
6 few weeks. Usually it's hard to estimate.

7       **"Q.** No further questions, Mr. Harris. Thank you."

8       **THE COURT:** Mr. Wagner, are there other --

9       **MR. WAGNER:** Well, yes. We're going to do some read  
10 from here. Is Mr. Edelman going to --

11       **THE COURT:** He still stays the witness.

12       **MS. MARTINEZ:** Do you need the complete transcript,  
13 Mr. Edelman -- I mean, Mr. Harris?

14       **MR. EDELMAN:** I think I just have excerpts, so I  
15 probably do.

16       **MS. MARTINEZ:** Okay. You have it?

17       **MR. EDELMAN:** No, no, I think I need it.

18       **MS. MARTINEZ:** Okay.

19       **THE COURT:** Where are you going to read? You need to  
20 tell me, because I don't know.

21       **MS. MARTINEZ:** I will start on page 18, lines 4 to 11.

22       **"Q.** What do you understand -- how do you understand they  
23 come up with what they pay you?

24       **"A.** Oh, they give us a driver's handbook, for one, and it  
25 shows how much you get for drop and hook pay or whatever.

**HARRIS - DIRECT**

1 It is listed on a Green Bar. The handbook doesn't change  
2 every year. The Green Bar will give you the amounts you  
3 get for each type of activities and your per mile."

4 **MS. MARTINEZ:** Page 18, lines 15 to 18.

5 **THE COURT:** All right.

6 **MS. MARTINEZ:** (Reading):

7 **"Q.** What about waiting pay?

8 **"A.** Detention pay, yeah. That's -- I don't know for sure  
9 if it's on there, but I know we get it after 45 minutes."

10 **MS. MARTINEZ:** Page 37, lines 21 to 24.

11 **THE COURT:** All right.

12 **MS. MARTINEZ:** (Reading):

13 **"Q.** So the times that you have a breakdown and they put  
14 you up in the hotel and reimburse it, do you still get the  
15 \$42?

16 **"A.** No."

17 **MS. CONWAY:** Your Honor, for completeness, I think 37,  
18 lines 21 through --

19 **THE COURT:** I agree. I agree. I think you need to  
20 read the next -- lines 1 through 7 on the next page. It  
21 explains the answer.

22 **MS. MARTINEZ:** Sure.

23 **MS. CONWAY:** Thank you.

24 **MS. MARTINEZ:** (Reading):

25 **"Q.** What about if -- sorry --

**HARRIS - DIRECT**

1       **"A.** You know, I really don't know the answer to that. I  
2 broke down once where they towed the truck to the store,  
3 dropped the trailer, towed the tractor to the dealer, and  
4 put me in a hotel, and I used the Wal-Mart credit card to  
5 pay for it. They paid me ADP per hour for the time that I  
6 was not with my truck. So I don't know."

7       **MS. MARTINEZ:** Page 45, lines 5 through 8.

8       **MS. CONWAY:** Your Honor, it's outside the scope.

9       **THE COURT:** Overruled.

10       **MS. MARTINEZ:** (Reading):

11       **"Q.** Do you get a hook there?

12       **"A.** Yes, I paid for the hook at Porterville.

13       **"Q.** What does the hook involve?

14       **"A.** Connecting to the trailer you're going to pull."

15       **MS. MARTINEZ:** Page 46, lines 1 to -- wait. 46, lines  
16 3 through 6.

17       **THE COURT:** All right.

18       **MS. MARTINEZ:** (Reading):

19       **"Q.** And all the work that you were just describing, the  
20 checking the trailer and proceeding to the outbound gate,  
21 that is all part of a hook?

22       **"A.** Right."

23       **MS. MARTINEZ:** And then 15 to 21 on the same page.

24       **THE COURT:** All right.

25       **MS. MARTINEZ:** (Reading):



**HARRIS - DIRECT**

1       **"Q.** Okay. And you got an activity pay for -- well, you  
2       would get an activity pay for the arrive and the activity  
3       pay for the hook?

4       **"A.** Right. Correct."

5       **MS. MARTINEZ:** Page 53, lines 19 to 24.

6       **THE COURT:** I'm sorry? 53?

7       **MS. MARTINEZ:** Yes, Your Honor, page 53, lines 19 to  
8       24:

9       **"Q.** So your go home day, you leave the truck in Apple  
10      Valley. Do you wash it before you leave to go home?

11      **"A.** Every other week.

12      **"Q.** What about fueling it?

13      **"A.** I fuel it."

14      **MS. MARTINEZ:** Page 113, lines 11 to 21.

15      **MS. CONWAY:** Your Honor, I believe it's beyond the  
16      scope and wasn't previously designated.

17      **THE COURT:** Overruled. You may read it.

18      **MS. MARTINEZ:** (Reading):

19      **"Q.** Not meal breaks, your rest breaks. Do you take rest  
20      breaks?

21      **"A.** Yeah.

22      **"Q.** What do you do?

23      **"A.** When I'm out on the road, normally I will pull up to  
24      the truck stop, go to the bathroom, grab a soda.

25      **"Q.** Do you log off duty for that?

## HARRIS - DIRECT

1       **"A.** No. That's on duty. We're allowed, I think, ten --  
2       two ten-minute breaks in a five-hour period.

3       **"Q.** Are you paid for those?

4       **"A.** No."

5       **MS. MARTINEZ:** Page 123. Page 123, lines 21, to page  
6       124, line 7.

7       **MS. CONWAY:** Your Honor, there was an objection within  
8       that and I would renew that objection.

9       **THE COURT:** The leading objection?

10      **MS. CONWAY:** Yes.

11      **THE COURT:** Overruled. You may read it.

12      **MS. MARTINEZ:** (Reading):

13      **"Q.** Have you ever requested to stay anywhere other than  
14      the cab on a layover?

15      **"A.** Yes.

16      **"Q.** How many times have you done that?

17      **"A.** Five or six, maybe --

18      **"Q.** Okay.

19      **"A.** -- in the past year.

20      **"Q.** Do you recall if you were paid the \$42 if you did not  
21      sleep in the cab?

22      **"A.** Yes. I recall that I know I wasn't paid."

23      **MS. MARTINEZ:** Page 24 [sic], lines 22 to page 125,  
24      line 7.

25      **THE COURT:** You mean page 124?

**HARRIS - DIRECT**

1           **MS. MARTINEZ:** 124, Your Honor, yes.

2           **THE COURT:** All right.

3           **MS. MARTINEZ:** (Reading):

4           **"Q.** What were the circumstances that led you to needing  
5           to be outside the cab those five to six times?

6           **"A.** My fiancée lives in Vegas and I would call -- well,  
7           they have a rule that if you're not going to be in the  
8           truck, call them, tell them where the truck is parked, and  
9           they will approve it or disapprove it. I always went to  
10          the same store if I was in the area. I would call, say,  
11          'My truck is parked at such and such store, I'm not going  
12          to be in it.' And they have security, roaming security.  
13          They will say, 'Okay,' and I call a cab and go."

14          **MS. MARTINEZ:** Same page, 125, starting at line 10 to  
15          page 126 --

16          **THE COURT:** 125 what?

17          **MS. MARTINEZ:** I'm sorry, Your Honor. Page 125,  
18          starting at line 10 --

19          **THE COURT:** Okay. Sorry. All right. Starting at  
20          line 10 to where?

21          **MS. MARTINEZ:** To page 126, ending on line 5.

22          **MS. CONWAY:** Your Honor, they previously did not  
23          designate that in the exchange of designations, and I don't  
24          think it's complete without -- if read, without lines 9 through  
25          15.

**HARRIS - DIRECT**

1           **THE COURT:** Okay. Well, I'll tell you to read all the  
2 way down to line 15.

3           **MS. MARTINEZ:** Okay.

4           **"Q.** Did they ever say that you couldn't go to your  
5 fiancée's when you wanted to?

6           **"A.** No. I never specified where I was going. They never  
7 asked. I just said, 'My truck is here. I won't be  
8 sleeping in it tonight,' and they would say yes or no.

9           **"Q.** Did they ever say no?

10          **"A.** No -- on one occasion. They gave me curfew store and  
11 I had hours to run, and I got there after the curfew and I  
12 couldn't deliver. And I said, 'Well, I can stay the  
13 night. Can I go down to such and such store and park?'  
14 It was only three miles down the road. The coordinator  
15 was trying to get me to go someplace else which was  
16 further away, and I convinced him closer store.

17          **"Q.** So it worked out?

18          **"A.** Yeah.

19          **"Q.** So they didn't -- so they didn't -- they initially  
20 said you couldn't go where you wanted to, but then you  
21 convinced them that -- convinced them, then you could?

22          **"A.** Right, because of the distance.

23          **"Q.** That was a conversation with a driver coordinator?

24          **"A.** Right.

25          **"Q.** Was that -- go ahead.

**HARRIS - DIRECT**

1       **"A.** I told him I would not be putting down layover on my  
2 paperwork. Each time I write 'no layover' so there  
3 wouldn't be no mistake that I got paid.

4       **"Q.** You didn't want to get paid?

5       **"A.** No, I didn't."

6       **MS. MARTINEZ:** No further reads, Your Honor.

7       **THE COURT:** Thank you. The witness may be excused.

8       **MR. EDELMAN:** Thank you, Your Honor.

9       **THE COURT:** Defendants may call their next witness.

10       **MS. CONWAY:** Your Honor, we don't have any further  
11 witnesses.

12       **THE COURT:** Does that mean you rest?

13       **MS. CONWAY:** Yes.

14       **THE COURT:** Okay.

15       **MR. WONG:** Subject to confirming that our exhibits  
16 have been received into evidence, we respectfully rest our  
17 case.

18                               (Defense rests.)

19       **THE COURT:** Do the plaintiffs have any rebuttal?

20       **MR. WAGNER:** Yes, we do, Your Honor. For our first  
21 rebuttal witness, we call Mr. Ed Parrish, who is a HR resource  
22 manager for Wal-Mart. He was sitting here a minute ago.

23       **MS. CONWAY:** Your Honor, Mr. Parrish was not on their  
24 witness list for today. We exchanged witness lists. He wasn't  
25 on it.

**HARRIS - DIRECT**

1           **MR. WAGNER:** He was on theirs for today to testify  
2 this morning.

3           **MS. CONWAY:** He -- Your Honor, should we have a  
4 sidebar?

5           **THE COURT:** Do you have anybody besides that?

6           **MR. WAGNER:** Yes. Yes.

7           **THE COURT:** I suggest we go ahead with that and then  
8 we can discuss this at the lunch break.

9           **MR. WAGNER:** Okay.

10          **MS. CONWAY:** Thank you.

11          **MR. MYRICK:** Your Honor, at this time, plaintiffs  
12 would like to call Mr. Michael Easterling.

13          **THE COURT:** First she will take your picture, then she  
14 will give you the oath, and then he will ask you some  
15 questions.

16          **THE WITNESS:** Thank you.

17          **THE CLERK:** Raise your right hand, please.

18                         **JAMES EASTERLING,**  
19 called as a witness for the Plaintiffs, having been duly sworn,  
20 testified as follows:

21          **THE CLERK:** Please state your full name for the  
22 record.

23          **THE WITNESS:** James Michael Easterling.

24          **THE CLERK:** James -- what was the last name?

25          **THE WITNESS:** Easterling, E-A-S-T-E-R-L-I-N-G.

**EASTERLING - DIRECT / MYRICK****REBUTTAL EXAMINATION****DIRECT EXAMINATION**

**BY MR. MYRICK:**

**Q.** Good afternoon, Mr. Easterling.

**A.** Good afternoon.

**Q.** Are you currently a driver for Wal-Mart?

**A.** Yes, I am.

**Q.** How long have you been a driver for Wal-Mart?

**A.** March 10, 1997 was my hire date.

**Q.** And, Mr. Easterling, we've heard a lot of testimony about arrive and drop and hook and depart from Wal-Mart drivers.

Did you perform a hook and depart from a store location?

**A.** Yes.

**Q.** And did you then follow a route that was designated by Wal-Mart to a DC at any time?

**A.** Yes.

**Q.** And you said you performed a hook and depart at a store; correct?

**A.** Correct. Yes.

**Q.** And you performed an arrive and drop when you reached your destination at a DC?

**A.** Yes.

**Q.** How long could a hook take?

**A.** Anywhere between 15 and 45 minutes.

**Q.** And you were paid 8.50, to your knowledge?

**EASTERLING - DIRECT / MYRICK**

1     **A.**    Yes.

2     **Q.**    And, likewise, how long could an arrive and drop take?

3     **A.**    Total of 15 to 45 minutes again.

4     **Q.**    And were you paid 9.25 for an arrive and drop?

5     **A.**    Yes.

6     **Q.**    How many miles could you drive in a day?

7     **A.**    500 to 525.

8     **Q.**    Was it possible for you to have to take a layover from  
9     this route?

10    **A.**    Yes.

11    **Q.**    And would you be taking your layover at a truck stop on  
12    occasion?

13    **A.**    Yes.

14    **Q.**    And when you arrived at the truck stop, did you perform a  
15    pre-trip -- I'm sorry, a post-trip inspection when you arrived?

16    **A.**    Yes.

17    **Q.**    And did you perform a pre-trip inspection in the morning?

18    **A.**    Yes, I did.

19    **Q.**    How much time did it typically take you to perform a  
20    pre-trip inspection?

21    **A.**    Typically, the minimum amount of time would be 15 minutes.

22    **Q.**    When was the last time you performed a pre-trip  
23    inspection?

24    **A.**    Day before yesterday.

25    **Q.**    You said the day before yesterday?



**EASTERLING - DIRECT / MYRICK**

1     **A.**    Yes.

2     **Q.**    Is it hard for you to estimate those times?

3     **A.**    No, not at all.  I've been doing this since 1965, so I  
4     pretty much know exactly what I'm looking for and how to  
5     perform them.

6     **Q.**    Do you perform a pre-trip inspection every day at work?

7     **A.**    Every day.

8     **Q.**    Do you perform multiple pre-trip inspections?

9     **A.**    Yes, we do.

10    **Q.**    Do you feel like you're exaggerating when you say it takes  
11    you 15 minutes?

12           **MS. CONWAY:**  Objection.  Leading, Your Honor.

13           **THE COURT:**  Overruled.

14           You may answer, sir.

15           **THE WITNESS:**  Say it one more time, sir.

16    **BY MR. MYRICK:**

17    **Q.**    Are you exaggerating -- do you feel like you are  
18    exaggerating when you say it took you 15 minutes?

19    **A.**    No, not at all.  Sometimes it can take more, depending on  
20    the equipment that we have.  We do have some older equipment  
21    that we have to pay special attention to.  We have newer  
22    equipment that you can basically just see real easily what's  
23    going on with them.  It's a technical thing.

24           We have different braking systems, different airing  
25    systems, different lighting systems.  So from using them every

**EASTERLING - DIRECT / MYRICK**

1 day, we know what we're looking at there. Older equipment is  
2 going to take you a longer time.

3 **Q.** Just so we're clear, your testimony is that you performed  
4 a pre-trip inspection multiple times in a week since 1965?

5 **A.** Yes, even while I was in the military. In the military,  
6 we were required to do this also. This is a safety thing, not  
7 only for myself, but for the public. If something seriously  
8 happens going down the road, I am the one that is responsible  
9 for it.

10 **Q.** And, similarly, how long --

11 **THE COURT:** You can pull the mic towards you.

12 **THE WITNESS:** Thank you, ma'am.

13 **BY MR. MYRICK:**

14 **Q.** How long does it take you to perform a post-trip  
15 inspection?

16 **A.** Post-trip inspections usually are a little bit different  
17 than the pre-trip inspections, because they are usually done at  
18 night because of the -- my times the way I do. But timing on  
19 that is usually about 15 minutes minimum.

20 **Q.** Do you sometimes have to fuel at the truck stop that you  
21 stop at?

22 **A.** Yes, we do.

23 **Q.** Can you provide for the jury your best estimate of how  
24 long it takes you to fuel?

25 **A.** Half hour to 45 minutes.

**EASTERLING - DIRECT / MYRICK**

1     **Q.**    Do you sometimes have to weigh?

2     **A.**    Yes, we do.

3     **Q.**    And how long can it take you to weigh the tractor and  
4     trailer?

5     **A.**    Fifteen minutes to a half hour, sometimes 45 minutes,  
6     depending on how long of a line that we have to wait in to get  
7     to the scale and then how long of a line we have to wait in  
8     inside to pay for the scale ticket and receive our certified  
9     scale weight.

10    **Q.**    And then, finally, are you on occasion inspected by the  
11    Department of Transportation?

12    **A.**    Yes, we are.  There's a sticker that they put in our lower  
13    window, and that sticker has a color.  And when we go through  
14    the scales, it will see that color and they'll know how long  
15    it's been since we have had an inspection.  They like to do  
16    them once a quarter.  So four times a year, basically, we're  
17    being pulled in to do that.

18    **Q.**    What's your best estimate of how long a DOT lasts?

19    **A.**    Usually about 30 minutes.

20    **Q.**    I'm not very good at math, but this looks like a total  
21    time 2 hours and 30 minutes.

22           Has anyone from Wal-Mart ever told you that this \$8.50 or  
23    this \$9.25 covers any of the time that you've spent on this  
24    layover?

25           **MS. CONWAY:**  Objection, leading and compound.

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1           **THE COURT:** Overruled.

2           You can answer.

3           **THE WITNESS:** No, they haven't.

4           **BY MR. MYRICK:**

5           **Q.** And to be clear, this layover took place 500 miles from  
6           where you received a hook; is that accurate?

7           **A.** Yes.

8           **Q.** And how far away did the layover take place from where you  
9           received the arrive?

10          **A.** 500 miles. It could be -- it just depends on where our  
11          destination is, how far away from where we're at.

12          **Q.** Did you receive any activity pay for this?

13          **A.** No, none at all.

14          **Q.** Is it possible that you performed multiple layovers?

15          **A.** Yes. Yes, it is.

16          **Q.** What's your understanding of Wal-Mart's policy with regard  
17          to layovers?

18          **A.** Layovers are -- you need to stay in your truck. You're  
19          allowed to get out and, of course, use the restroom or go get a  
20          bite to eat, but then you need to be back in your truck.

21          They're basically -- they want somebody there to watch their  
22          equipment and to watch the product that we're hauling.

23                There are special occasions that you can call and get  
24          permission like to stop at your -- through your hometown, but  
25          they're very specific as -- if you're hauling like a load of

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1 computers or a load of TVs or something like that, they're  
2 going to say, "No, you're going to have to go somewhere else  
3 and stay," and then you have to stay with that truck.

4 **Q.** How much money are you paid for a layover?

5 **A.** \$42.

6 **Q.** What's your understanding of how Wal-Mart determines that  
7 they were going to pay you \$42 for the ten hours of sleeping in  
8 the cab?

9 **A.** When they first started this, it was based upon --

10 **MS. CONWAY:** Your Honor, lacks foundation --

11 **THE WITNESS:** -- minimum wage --

12 **MS. CONWAY:** -- and also the witness is being  
13 nonresponsive.

14 **THE COURT:** We don't know what his response was  
15 because you cut him off in the middle of it.

16 **MR. MYRICK:** I can reask the question if you like,  
17 Your Honor.

18 **THE COURT:** Why don't you. Her foundational question  
19 is actually, I think, a really good question. So you better  
20 lay a foundation if you're going to ask him the question again.

21 **BY MR. MYRICK:**

22 **Q.** How much are you paid for a layover?

23 **A.** \$42.

24 **Q.** Do you know where the \$42 comes from?

25 **A.** Yes.

**EASTERLING - DIRECT / MYRICK**

1     **Q.**     Okay. And what is your understanding of how --

2                 **THE COURT:** How does he know that?

3     **BY MR. MYRICK:**

4     **Q.**     How do you know that?

5     **A.**     From working with Wal-Mart for years. We have meetings  
6     that are called grassroots meetings, where the drivers are all  
7     gathered up at certain times. These are questions that are  
8     asked by the drivers, including myself, is, "Where do you come  
9     up with \$42? How in the world is that relevant to anything we  
10    do?" And --

11               **MS. CONWAY:** Your Honor, this is hearsay.

12               **THE COURT:** Overruled.

13               **THE WITNESS:** It is not.

14               **THE COURT:** Look, I get to say --

15               **THE WITNESS:** I'm sorry, ma'am.

16               **THE COURT:** -- whether it is or isn't.

17               **THE WITNESS:** That just kind of --

18               **THE COURT:** That's my job here.

19               **THE WITNESS:** -- took me by surprise.

20               **THE COURT:** So -- but I'm overruling your objection,  
21    just like you said.

22               **MS. CONWAY:** Thank you, Your Honor. I appreciate  
23    that.

24               **THE WITNESS:** Thank you, ma'am.

25

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1 **BY MR. MYRICK:**

2 **Q.** You can continue.

3 **A.** Anyway, we have these grassroots meetings where we are  
4 allowed to ask questions and we talk about, with management,  
5 what we do on a daily basis.

6 And that has been brought up time and time again, is to --  
7 where this \$42 came from. The answer is that when it was first  
8 established, it was based on minimum wage. Now, as minimum  
9 wage has changed and our hours of service also has changed, the  
10 \$42 never has changed.

11 **Q.** Is it your understanding that Wal-Mart receives a benefit  
12 by requiring you to sleep in the truck on these layovers?

13 **MS. CONWAY:** Objection. Leading. Lacks foundation.

14 **THE COURT:** Also, I think it's a very confusing  
15 question. I will sustain her objections.

16 **BY MR. MYRICK:**

17 **Q.** Why does Wal-Mart require you to sleep in the truck on  
18 layovers?

19 **MS. CONWAY:** Same objection, Your Honor.

20 **THE COURT:** There will be a foundation problem with  
21 this if you are saying why does Wal-Mart do it. So you better  
22 lay a foundation.

23 **BY MR. MYRICK:**

24 **Q.** Does Wal-Mart require you to sleep in the truck on  
25 layover?

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1     **A.**    Yes, they do.

2     **Q.**    Why?

3             **MS. CONWAY:**   Same objection, Your Honor.

4             **THE COURT:**   How would he know?

5             **MR. MYRICK:**   I'm asking his understanding, Your Honor.

6             **THE COURT:**   He has to have a foundation for the  
7 understanding to make it relevant.

8             **MR. MYRICK:**   Okay.

9     **BY MR. MYRICK:**

10    **Q.**    Do you understand why Wal-Mart requires you to sleep in  
11 the truck on layover?

12    **A.**    Yes, I do.

13    **Q.**    How do you understand that?

14    **A.**    Again, from the beginning of my first day at Wal-Mart when  
15 we come into orientation, they explain to us about the layover  
16 procedures and why you need to stay in that truck. And we are  
17 told flat out that the reason is -- is that you are there to  
18 guard the property and the commodity that we have in the  
19 trailer there. That is the purpose for us to stay there.

20    **Q.**    Have you ever experienced a break-in on layover?

21    **A.**    Yes, I have.

22    **Q.**    And can you describe your experience of a break-in on a  
23 layover.

24    **A.**    I was parked at a Wal-Mart store in Sacramento and some  
25 people came up behind my trailer and took bolt cutters and they



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1 cut the padlock off the back of my trailer, and they opened the  
2 door.

3 I heard this, but our instructions from Wal-Mart is to not  
4 engage them in any way other than turn our lights on so they  
5 can see in the back, and then that -- they got in their  
6 vehicles and ran off. And then I just called the -- the police  
7 and then they came out and they made a report, and that was  
8 basically it.

9 The most important thing, what happens in this is they  
10 have to do an audit of that trailer, so that trailer has to go  
11 to that facility and then they have to take every piece of  
12 freight out of that trailer and they have to count it and make  
13 sure what is present and what has been taken. And that takes a  
14 lot of time.

15 **Q.** Has anyone from Wal-Mart ever told you that on one of  
16 these layovers, you could lock the truck up and leave it for  
17 ten hours?

18 **A.** Never. Never.

19 **Q.** Has anyone from Wal-Mart ever told you that you are  
20 allowed to take a layover at your home without Wal-Mart's  
21 permission?

22 **A.** No. You have to have permission. You have to call ahead  
23 of time and you have to get a -- permission from either a  
24 manager or an ops manager, and they are going to question as to  
25 what commodity you have in your trailer and where you're going

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1 to park it, how long you're going to be gone.

2 You have to call and let them know when you're leaving  
3 your truck and you have to also call and notify them when  
4 you're back in the truck.

5 **Q.** How many nights a week are you away from your family when  
6 you're driving for Wal-Mart?

7 **A.** Four to five.

8 **Q.** And can you describe for the jury what that means in terms  
9 of your relationship with your family?

10 **MS. CONWAY:** Objection, Your Honor. Relevance.

11 **THE COURT:** Well, I think we had actually quite a lot  
12 of family-oriented testimony already, so I will allow it.

13 **BY MR. MYRICK:**

14 **Q.** You can answer the question, Mr. Easterling.

15 **A.** Well, having been here for going on 20 years in March,  
16 I've missed a lot out of my children, a lot.

17 If you want, for example, to be there for graduation, you  
18 have to plan a week or two ahead to make sure you can get that  
19 time off. As far as baseball games, swimming events, things  
20 like that, just little things, like being a chaperon or  
21 something at some event, we don't get to do that.

22 It's very difficult coming home to a place where you're  
23 only there for maybe a day and a half or two days. You're like  
24 a stranger in your own house. I have to call to see what's  
25 going on in my home so when I come home, I don't make plans for

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1 myself that offsets the plans that my wife has made for our  
2 children and her.

3 And it's very difficult. I have a very strong wife.  
4 We've been married for -- we're going on 45 years and she  
5 supports me.

6 **Q.** We've heard from a couple drivers that came in and  
7 testified on behalf of Wal-Mart, and these were set run  
8 drivers.

9 Can you describe for the jury what a set run driver is.

10 **A.** Uh-huh. Set run drivers, that term we changed now and  
11 it's basically called set work. And what that means is -- is  
12 that you will come to work on a Monday morning or whenever your  
13 workweek starts -- it could be Monday through Sunday, for that  
14 matter -- and you will leave, you'll go to a set route, to a  
15 set destination, come around, and come right back to Wal-Mart  
16 again, and then you're home that night.

17 And we have a few set work positions now where you're out  
18 on the road, but there's not very many of those and most of  
19 these are taken by seniority drivers, drivers who have been  
20 there for a while.

21 **Q.** Can you describe for the jury what your hours of work are  
22 like when you're driving for Wal-Mart.

23 **A.** Oh, basically, we're working 5 days a week, 14 hours a  
24 day. Now, that's almost like working two jobs. Normal job is  
25 going to be basically 8 hours a day. Well, I'm working like

**EASTERLING - DIRECT / MYRICK**

1 two 7-hour jobs five days a week, and it's very tough.

2 I'm living in an area about the size of a king-size  
3 mattress, to be honest. The whole -- where I sleep, where I  
4 live, and where I drive, just picture a king-size mattress and  
5 that's about the size of it.

6 Our diets are not very good. We have a lot of health  
7 issues as truck drivers and we have some very long hours. If  
8 my morning starts -- or my day starts at 8:00 in the morning,  
9 my day won't end until 10:00 at night, and that's five days a  
10 week. That's the way it goes.

11 **Q.** What's your income level at Wal-Mart?

12 **A.** My income level is around about \$90,000 a year, but it's  
13 very misleading. You can take a third of that --

14 **MS. CONWAY:** Objection. Nonresponsive, Your Honor.

15 **MR. MYRICK:** I will ask a follow-up question.

16 **BY MR. MYRICK:**

17 **Q.** What do you mean by "misleading"?

18 **A.** What I mean is that 90,000 sounds like a lot of money to  
19 most folks, but a third of that goes right off the top for  
20 living expenses out on the road.

21 I know you guys probably don't eat out as much as I do,  
22 but to get a decent meal, you are going to pay 15 to \$20 to get  
23 anything that is decent to eat. We try to eat something like  
24 cereal or something in the morning that we can prepare ourself  
25 and then we try to make a cold-cut sandwich or heat up a cup of

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1 soup or something like that for lunch, but Wal-Mart has no  
2 subsistence for us at all. They don't pay us any per diem at  
3 all.

4 My clothes that I wear, except for my shirts, they supply  
5 shirts for us, but my clothes, my gloves, everything, my  
6 glasses, everything that I use out on the road I have to pay  
7 for by myself.

8 **Q.** Have you ever complained about your pay to Wal-Mart?

9 **A.** Yes.

10 **Q.** And what were the complaints that you made to Wal-Mart  
11 about your pay?

12 **A.** In grassroot meeting, several times I have stood up and I  
13 have said, "Hey, you know what? We're spending a lot of time  
14 washing your trucks," because these trucks are like billboards  
15 going down the roads, and so we've been instructed to keep them  
16 clean. So I'm spending time washing them, I'm spending time  
17 doing all of these little things like post inspection, pre-trip  
18 inspection, DOT time, vendor time, weighing the truck.

19 Weighing the truck is a whole new adventure. You would  
20 think you just drive across the scale and it's that simple, but  
21 it's not. We have ways of adjusting weight by moving the  
22 tandems back and forth. Those are the rear wheels of the  
23 trailer. That all takes time to do, and we are not paid  
24 anything for doing that. And in my opinion, that's just not  
25 fair. That's just not the way things should be.

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1 **Q.** What's Wal-Mart's response been to your complaints?

2 **A.** Pretty much the same as they have always been in my going  
3 on 20 years. "You know, we're really looking into that and  
4 we'll try to get back to you on that, Michael, and see if we  
5 can -- and do something about it."

6 But it's never been that way. And trust me when I tell  
7 you, I am not the only one that complains. We have a large  
8 group that are saying, "Hey, this is just not right."

9 **MS. CONWAY:** Objection, Your Honor. Move to strike as  
10 nonresponsive.

11 **THE COURT:** Sustained.

12 **BY MR. MYRICK:**

13 **Q.** How do you feel about Wal-Mart?

14 **A.** Well, Wal-Mart, when I first started working here, was a  
15 pretty decent job. Things have changed over the years that I  
16 have been here, and it comes down to right now is that I'm just  
17 not really happy with the way and the direction that they have  
18 taken.

19 I believe they could do more for their drivers. We give  
20 them a lot and a lot is asked of us, and I just think that we  
21 need to be compensated for what we do. It's only fair to us as  
22 drivers and fair to our families, too. Our families go through  
23 a lot.

24 **MR. MYRICK:** No further questions, Your Honor.

25 **THE COURT:** Thank you.

**EASTERLING - CROSS / CONWAY**

1 Ms. Conway.

2 **MS. CONWAY:** Thank you, Your Honor.

3 **REBUTTAL EXAMINATION**

4 **BY MS. CONWAY:**

5 **Q.** In fact, this year you're making close to 97,000 a year;  
6 is that correct?

7 **A.** This year?

8 **Q.** Yes.

9 **A.** I have no idea.

10 **Q.** And, in fact, in 2014, you made \$96,267.50?

11 **A.** I'm assuming that's gross.

12 **Q.** Yes, gross. We all get paid on a gross amount.

13 **A.** Yes.

14 **Q.** Everyone pays taxes; right?

15 So in 2014, you made \$96,267.50; is that correct?

16 **A.** I -- if you're saying so, yes, ma'am.

17 **Q.** Okay. And when you're at a DC, Wal-Mart feeds you; is  
18 that correct? There's frequently barbecues --

19 **A.** Only on special occasions.

20 **Q.** They give you free coffee?

21 **A.** Yes, there is coffee there if you want to drink it, if you  
22 would call that coffee.

23 **Q.** And you have been a truck driver how many years?

24 **A.** I first started driving a truck in 1965.

25 **Q.** So it's over 50 years?

## EASTERLING - CROSS / CONWAY

1     **A.**    Yes.

2     **Q.**    And you understood when you joined Wal-Mart what a --  
3     truck driving entailed; is that correct?

4     **A.**    I'm pretty sure.

5     **Q.**    You would pretty much describe yourself as an experienced  
6     driver when you joined Wal-Mart?

7     **A.**    Yes.

8     **Q.**    When you joined Wal-Mart, you told Wal-Mart that you were  
9     very happy and you felt that you had come home and that you  
10    felt that it was a great job to have at Wal-Mart?

11    **A.**    Yes.    That was in 1997.

12    **Q.**    And you have stayed at Wal-Mart for 45 years; is that  
13    correct?

14    **A.**    Yes.

15    **Q.**    And you've been married for 45 years --

16    **A.**    No, I haven't been at Wal-Mart for 45 years.

17    **Q.**    How long have you been at Wal-Mart?

18    **A.**    Since 1996, and that would be 19 years.

19    **Q.**    And you're still at Wal-Mart; is that correct?

20    **A.**    Well, yes.

21    **Q.**    You just talked about being -- having your trailer broken  
22    into; is that correct?

23    **A.**    Yes.

24    **Q.**    And you were specifically instructed by Wal-Mart not to  
25    engage with anyone that broke into your trailer; is that



## EASTERLING - CROSS / CONWAY

1 correct?

2 A. Yes.

3 Q. And you followed Wal-Mart's instruction not to engage; is  
4 that correct?

5 A. Yes.

6 Q. You talked about inspections -- I mean, excuse me, DOT  
7 inspection taking 30 minutes; is that correct?

8 A. Yes.

9 Q. And it's your experience it takes 30 minutes?

10 A. It can be 20 minutes. What the DOT rule is is they need  
11 to have you out of there by 30 minutes. They by law cannot  
12 take any more than 30 minutes of your time.

13 Q. So by law, the maximum is 30 minutes, but, in fact, you  
14 have had DOT inspections less than 30 minutes; is that correct,  
15 Mr. Easterling?

16 A. I would probably imagine so over the years, yes.

17 Q. In fact, as recently as 2015, you had a DOT inspection  
18 that was only 19 minutes; is that correct?

19 A. Yes. But you have to understand there is different  
20 variations of DOT inspections.

21 Q. Is that correct?

22 A. If you're telling me that. I don't have the paper that  
23 you have.

24 Q. Okay. So as far as you know, in 2015, you had a DOT  
25 inspection that only lasted 19 minutes; is that correct?

## EASTERLING - CROSS / CONWAY

1     **A.**    I'm going to ask you what class of DOT inspection was it?

2     **Q.**    How about a Level 1 inspection?

3     **A.**    Level 1 inspections are different than Level 2s or 3s.

4     **Q.**    Well --

5     **A.**    Level 1 inspection is a very walk-around inspection.

6     They're basically wanting to look at your logbook, your medical  
7     card, and they run information on your driver's license, as far  
8     as I'm concerned.

9     **Q.**    And, Mr. Easterling, you understand that oftentimes it's  
10    just a Level 1 inspection that the DOT does?

11    **A.**    No, that's not true at all.  Actually, what happens is --  
12    is that if it's raining outside, they're not going to want to  
13    get underneath that trailer and check everything they need to  
14    check because of water, mud, and road debris falling off the  
15    trailer.  So that's when they do the minimum inspection.

16           On a bright, sunny day, if your sticker is gone, they are  
17    going to do the whole thing.  Some guys are more thorough than  
18    others.  It could take 20 minutes; it could take 30 minutes.

19    **Q.**    And it could take less, depending on how thorough the DOT  
20    inspector is; is that correct?

21    **A.**    Not if they're doing brake checks and everything.  Because  
22    they have to get on a little --

23    **Q.**    I'm talking about a Level 1 inspection.

24    **A.**    Oh, it could take them 15 minutes.

25    **Q.**    It could take them 15 minutes; is that correct?

**EASTERLING - CROSS / CONWAY**

1     **A.**    Uh-huh, for Level 1.  It doesn't take much to just take  
2     your driver's license and go over and look on the computer,  
3     make sure you have your medical card and your logbook's up to  
4     date.

5     **Q.**    That doesn't take much time at all; is that correct?

6     **A.**    I just said it takes about 15 minutes.

7     **Q.**    I want to show you --

8                 **THE COURT:**  Tracy.

9                 **MS. CONWAY:**  May I approach the witness, Your Honor?

10                **THE COURT:**  You may.

11     **BY MS. CONWAY:**

12     **Q.**    Have you had a chance to look at Defendant's Exhibit 639?

13     **A.**    Yes.

14     **Q.**    Is that your handwriting on this exhibit?

15     **A.**    All except for this at the bottom.  I don't know who this  
16     is.

17     **Q.**    You don't recognize this trip sheet?

18     **A.**    I recognize the trip sheet, but I don't recognize -- I  
19     don't know who signed this down here.  That's not my  
20     handwriting.

21     **Q.**    I'm talking about the body of this exhibit.  Is that your  
22     writing on the body of this exhibit?

23     **A.**    Yes.

24     **Q.**    Do you recognize this trip sheet as a trip sheet that you  
25     filled out?

**EASTERLING - CROSS / CONWAY**

1     **A.**    Yeah.

2     **Q.**    And did you fill it out in October?

3     **A.**    Yes.

4     **Q.**    And did you fill it out accurately?

5     **A.**    As far as I'm concerned, yes.

6     **Q.**    When you filled out trip sheets, you intended to fill out  
7 accurately the time you placed on those trip sheets; is that  
8 correct?

9     **A.**    Uh-huh.

10    **Q.**    That means yes?

11    **A.**    Yes.  What happens is when you're doing this, these  
12 numbers that are on here as far as the beginning time,  
13 departing time, and whatnot, those numbers have to coincide  
14 with what's on your computer.

15    **Q.**    Have you ever falsified a number that you've put on a trip  
16 sheet?

17    **A.**    No.

18    **Q.**    Okay.

19           **MS. CONWAY:**  I would move to publish and move into  
20 evidence --

21           **THE COURT:**  Any objection?

22           **MR. MYRICK:**  No objection.

23           **THE COURT:**  Thank you.  It will be received.

24           (Trial Exhibit 639 received in evidence)

25

## EASTERLING - CROSS / CONWAY

1 BY MS. CONWAY:

2 Q. On this particular trip sheet, can you tell me how many  
3 activity codes you received on this trip?

4 A. How many activity codes?

5 Q. Yes.

6 A. One, two, three -- four.

7 Q. So this trip shows a date that you left at 10:59; is that  
8 correct?

9 A. Yes.

10 Q. And you returned to Red Bluff the same day; is that  
11 correct?

12 A. It appears that we did, yes.

13 Q. And how many hours did you spend on this trip?

14 A. Total?

15 Q. Total.

16 A. Oh, gosh. From 11:00 -- call it 11:00 in the morning  
17 until 8:30 at night.

18 Q. Okay. And do you know how much money you received on this  
19 day?

20 A. I have no idea, no.

21 Q. But you do know you had two hooks, two arrives, and you  
22 also received mileage; is that correct?

23 A. Yes.

24 Q. You were allowed to choose your schedule when you were a  
25 driver at Wal-Mart; is that correct?

**EASTERLING - REDIRECT / MYRICK**

1     **A.**     No.

2     **Q.**     Did you ever bid on a schedule?

3     **A.**     No.

4             **MS. CONWAY:** No further questions, Your Honor.

5             **THE COURT:** Thank you.

6             Anything further, Mr. Myrick?

7             **MR. MYRICK:** Very briefly, Your Honor.

8                             **REBUTTAL EXAMINATION**

9     **BY MR. MYRICK:**

10    **Q.**     Mr. Easterling, you mentioned your hours have changed over  
11    time.

12             Do you recall that?

13    **A.**     Uh-huh.

14    **Q.**     Can you explain to the jury what you mean by that?

15    **A.**     Well, when I first came to work here, we were allowed to  
16    drive ten hours a day and then we would have a rest break of  
17    eight hours. That changed.

18             What happened is -- and let me back up a little bit. I  
19    know this is confusing for you, but our days would start at  
20    midnight and they would go to the following midnight. Okay?  
21    So anything we wanted to do, as long as we had an eight-hour  
22    break, we could do in that period of time.

23             That changed. How that changed is -- is that now we have  
24    14 hours in a day that we have to do everything. For example,  
25    if I start at 8:00 in the morning, by 10:00 that night, I have

**EASTERLING - REDIRECT / MYRICK**

1 to have everything done in that day. I'm allowed to drive 11  
2 hours a day, and that gives 3 hours left to do all the side  
3 work that we need to do.

4 And I know -- I may be losing you folks here because this  
5 is complicated.

6 One hour of that is taken away by mandatory rest breaks  
7 that we need to take by federal rule, so now we're down to two  
8 hours.

9 And you have to remember now, this 11 hours, this is how I  
10 make my most money. I'm a professional driver. I'm paid the  
11 most by the mile. And so if I'm doing time like what we just  
12 added up over here on this board, that time comes right off of  
13 my 14 hours. There may be times of a day when I'm not allowed  
14 to drive no more than maybe 9 hours a day because of all of  
15 these little things that I've had to do that I'm not being paid  
16 for.

17 And so when they tell me that I make \$90,000 or 90 --  
18 whatever she just said a while ago, it could be a lot more if I  
19 was allowed to drive -- or if I'm being paid for the things  
20 there that I feel that we should be paid for, because that is  
21 work. It is a lot of work to do those things.

22 **Q.** Has the length of a layover changed?

23 **A.** Yes.

24 **Q.** How?

25 **A.** Well, it was eight hours. Now it is ten hours.

**EASTERLING - RECROSS / CONWAY**

1     **Q.**    Are you only paid activity pay at the beginning and the  
2     end of your trip?

3     **A.**    Unless you're doing -- like going to a vendor, where we're  
4     going to pick up Wal-Mart product, then we'll be paid something  
5     to do a live load or a -- maybe a live unload at a store.  
6     That's an activity code that they have there.

7            But then if it takes a longer time for us to accomplish,  
8     we have to give them 45 minutes before we're paid again.

9     **Q.**    Are you paid activity pay for all the activity you perform  
10    when you stop for layovers?

11    **A.**    No. We're not paid anything for that.

12    **Q.**    You gave an estimate of 30 to 45 minutes for fueling.

13            Do you recall that?

14    **A.**    Yes.

15    **Q.**    Are you counting in that estimate the time that you have  
16    to spend waiting for a fuel spot to open up?

17    **A.**    Yes, sir, I am.

18            **MR. MYRICK:** No further questions, Your Honor.

19            **MS. CONWAY:** Just one brief question, Your Honor.

20                            **REBUTTAL EXAMINATION**

21    **BY MS. CONWAY:**

22    **Q.**    You never gave a deposition in this case; is that correct?

23    **A.**    No, I never did.

24    **Q.**    And you never talked to any of the experts in this case;  
25    is that correct?



## PROCEEDINGS

1     **A.**     No, I have not.

2             **MS. CONWAY:** No further questions.

3             **THE COURT:** May the witness be excused?

4             **MS. CONWAY:** Yes, Your Honor.

5             **MR. MYRICK:** Yes, Your Honor.

6             **THE COURT:** Thank you very much, sir. You are  
7 excused.

8             **THE WITNESS:** May I say one thing?

9             **THE COURT:** No, you may not. You can go talk to your  
10 lawyer.

11            **THE WITNESS:** Well, I just wanted to tell them thank  
12 you.

13            **THE COURT:** All right. It's -- I think we'll take our  
14 lunch recess at this time, so, ladies and gentleman, if you'd  
15 be ready to come back, please, at quarter till 1:00.

16            In the meantime, don't speak with each other or anyone  
17 else about this case. Don't make up your minds. You have not  
18 heard all the evidence yet.

19            (Proceedings were heard out of presence of the jury:)

20            **THE COURT:** So what is the issue with the witness?

21            **MR. WAGNER:** Mr. Parrish, who was present during every  
22 second of this trial when we notified --

23            **THE COURT:** What is the name?

24            **MR. WAGNER:** Ed Parrish. He's the human resource  
25 director for Wal-Mart and the representative for Wal-Mart who's

## PROCEEDINGS

1       been sitting here through the whole case.

2               And he was on defendant's witness list, and as soon as we  
3       notified them that we also wanted to talk to him today, he's  
4       disappeared. I don't know where he is.

5               **MS. CONWAY:** Your Honor --

6               **MR. WAGNER:** Hold -- he's gone.

7               And I -- at 11:05, I notified defendant we are going -- we  
8       wanted to call him. I mean, he was already on the witness  
9       list, and all of a sudden he's disappeared inexplicably.

10              **MR. EDELMAN:** He's here, Your Honor. He hasn't  
11       disappeared. He is absolutely available.

12              Two issues. We didn't call him because we've run out of  
13       time, and now that they're calling six rebuttal witnesses,  
14       we've had to make adjustments.

15              But he's not in any way an appropriate rebuttal witness to  
16       their case, which is the first point I would like to make. And  
17       it ties into the concern I have about what we're doing at this  
18       point -- what they're doing.

19              We just saw through Mr. Easterling. He got up and he gave  
20       testimony -- you might -- I understand your point of view that  
21       you think that part of our case they should be able to rebut  
22       relating to what's included within the activity code. That was  
23       about five minutes of his testimony. The rest of his testimony  
24       could not, under any theory, be considered rebuttal.

25              He was on their witness list. They actually notified us

## PROCEEDINGS

1 last week that they were going to call him in their case in  
2 chief and then they changed their mind and decided to put him  
3 over for rebuttal, and now they are putting him on on  
4 basically -- it has to be -- this is obviously just my  
5 observation, but they're putting him on every topic that they  
6 put all their witnesses on during their case in chief.

7 And I would like to ask the Court to consider the  
8 following proposition. That if you're going to allow these  
9 people to come in as rebuttal witnesses, that the Court please  
10 consider which aspects of their testimony are actually  
11 rebuttal. Because the case law is clear that they're not  
12 allowed to call witnesses now to bolster their case in chief.

13 They can't just time it so that they call these witnesses  
14 later on at the end of the case right before the case goes to  
15 the jury. It has to be in rebuttal of something that the  
16 defense has done that's new or different or unanticipated, but  
17 it can't just be, "We're going to put part of our case on at  
18 the very end." And I would say that -- that that was 90  
19 percent of what Mr. Easterling testified to.

20 So that's my first -- I have a real concern with the abuse  
21 of the rebuttal process by the plaintiffs at this point and  
22 would ask the Court to consider adopting some kind of  
23 guidelines as to what is appropriate rebuttal testimony and  
24 what isn't.

25 **THE COURT:** Do you want to say something?

## PROCEEDINGS

1           **MR. WAGNER:** Only if the Court needs me to.

2           **MR. ARTENIAN:** I'll say something --

3           **THE COURT:** Okay.

4           **MR. ARTENIAN:** -- if I may.

5           **THE COURT:** Just make your record, because I disagree  
6 with what he just said, but I think you need a record.

7           **MR. ARTENIAN:** Okay. So our position is we've heard  
8 numerous drivers or several drivers called by the defense who  
9 are current employees come in and say, "I don't need permission  
10 to leave my truck during a layover." And so that's one of the  
11 key pieces of testimony on rebuttal, is people coming in and  
12 saying, "Well, there is qualifications to that."

13           This point about leaving the truck somewhere and just  
14 having to notify them has a second piece to it, and that is,  
15 "And then they will say yes or no depending on what the load is  
16 in the truck." And so that is in direct response to them  
17 having brought people and saying to the contrary. So that is  
18 one of the things.

19           And then the other thing is this subsumed or built-in or  
20 included within, whatever you call it, pay code argument that  
21 they're making, is that we just had a driver come in and give  
22 an example of where he's out in Timbuktu somewhere and he's got  
23 to get up and he's got to do his pre-trip inspection, and there  
24 is no conceivable way that that activity is connected by  
25 hundreds of miles to where there's a drop or a hook where he

## PROCEEDINGS

1 conceivably could be connecting those two activities together.

2 And that's in direct rebuttal to what the defendant's  
3 primary case has been about, and that's why we're doing this.

4 **THE COURT:** All right. So that was number one.

5 You said there was a number two?

6 **MR. EDELMAN:** Well, the number two has to do with Ed  
7 Parrish.

8 **THE COURT:** What about Ed Parrish?

9 **MR. EDELMAN:** He's here. He wasn't designated as a  
10 rebuttal witness by them. We've --

11 **THE COURT:** They evidently thought you were going to  
12 call him today.

13 **MR. EDELMAN:** Well, they may have thought that as of  
14 Monday, but we've run out of time to call additional witnesses.  
15 But that doesn't make him an appropriate rebuttal witness,  
16 Your Honor.

17 **MS. CONWAY:** Additionally, Your Honor, I had the  
18 conversation with Mr. Wagner and he did not tell me he was  
19 going to call Ed. He simply inquired, "Where is Ed?" He just  
20 asked where he was, he didn't tell me he was going to call him.  
21 And when we got the list last night, Ed Parrish was not on the  
22 list.

23 **THE COURT:** Was he on your list still by last night?

24 **MS. CONWAY:** By last night, he wasn't. Last night --

25 **MR. EDELMAN:** No.

## PROCEEDINGS

1           **MS. CONWAY:** -- we were talking about Dr. Walker, Gary  
2 Martin. I don't believe he was on the list last night.

3           **THE COURT:** Well, in any event, if you're going to  
4 call him, what do you want to call him for that would be proper  
5 rebuttal?

6           **MR. ARTENIAN:** It would be the same topics. Since  
7 he's the director of human resources, he's got knowledge of how  
8 the system -- how the pay code system was devised and whether  
9 or not those activities that we're disputing in this lawsuit  
10 are included in the pay codes and whether amendments were  
11 published and distributed or anything along those lines.

12           **MR. EDELMAN:** And our position, Your Honor, is -- I  
13 know you disagree with it, but that has been the subject matter  
14 of the entire trial from day one, and certainly in their case,  
15 they have questioned witness after witness on that topic. We  
16 have done it in our case.

17           And rebuttal isn't supposed to simply be Round 3, where  
18 you start all over. So I just do not think this is proper  
19 rebuttal. I think it is -- they are misusing the rebuttal  
20 process.

21           **THE COURT:** I think your record on that is clear.

22           If Mr. Parrish is -- he hasn't left the building?

23           **MR. EDELMAN:** No, Your Honor.

24           **THE COURT:** Well, if you want to call him, then I  
25 would direct you to make him available to be called.

## PROCEEDINGS

1           **MR. EDELMAN:** Thank you, Your Honor.

2           **MR. WAGNER:** What time are we to be back, Judge?

3           **THE COURT:** Quarter till.

4           (Proceedings were heard out of presence of the jury:)

5           **THE CLERK:** Come to order.

6           **THE COURT:** Are we ready?

7           **MS. MARTINEZ:** Yes, Your Honor.

8           **MR. WAGNER:** Yes, Your Honor. Thank you.

9           (Proceedings were heard in the presence of the jury:)

10           **THE COURT:** All right. The plaintiffs may call their  
11 next witness.

12           **MS. MARTINEZ:** Your Honor. The plaintiffs call Pamela  
13 Allred to the stand.

14           **THE CLERK:** Raise your right hand.

15                           **PAMELA ALLRED,**

16 called as a witness for the Plaintiffs, having been duly sworn,  
17 testified as follows:

18           **THE CLERK:** Please state your full name for the  
19 record.

20           **THE WITNESS:** Pardon me?

21           **THE CLERK:** Please state your full name for the  
22 record.

23           **THE WITNESS:** Pamela Rae Allred.

24           **THE CLERK:** Spell your last name.

25           **THE WITNESS:** A-L-L-R-E-D.

**ALLRED - DIRECT / MARTINEZ**

1           **THE COURT:** Ms. Martinez.

2                           **REBUTTAL EXAMINATION**

3           **BY MS. MARTINEZ:**

4           **Q.**    Good afternoon, Ms. Allred. Today I'm going to ask you  
5           about your years of employment with Wal-Mart. When did you  
6           first start working for Wal-Mart?

7           **A.**    In August of 1994.

8           **Q.**    When did your employment with Wal-Mart end?

9           **A.**    I retired in October of 2012.

10          **Q.**    And when you were hired by Wal-Mart, were you hired as a  
11          private fleet driver?

12          **A.**    Yes.

13          **Q.**    And did you remain a private fleet driver throughout the  
14          entire length of your employment with Wal-Mart?

15          **A.**    Yes.

16          **Q.**    Because the class period in this case is October 2004 to  
17          October 2015, I'm going to ask you to limit your testimony to  
18          that time period. Can you do that?

19          **A.**    Yes.

20          **Q.**    What was your home DC, Ms. Allred?

21          **A.**    I was in Red Bluff.

22          **Q.**    Was that always your home DC?

23          **A.**    Yes, it was.

24          **Q.**    And what was your schedule?

25          **A.**    I was -- worked week on, week off.



## ALLRED - DIRECT / MARTINEZ

1 Q. So is that the 7 days on, 7 days off?

2 A. Yes.

3 Q. And how often were you paid?

4 A. Twice a month.

5 Q. And how were you paid?

6 A. How was I paid? I'm not sure I know.

7 Q. For example, per activity --

8 A. Oh, yes. I was paid by the mile. I was paid per activity  
9 and sometimes hourly.

10 Q. Okay. And how did you know what activities you would be  
11 paid for?

12 A. It was in the pay manual.

13 Q. In your usual work duties, did you ever meet with the  
14 driver coordinator when starting a new trip?

15 A. Yes.

16 Q. How many times per week did you meet with the driver  
17 coordinator?

18 A. Four, six times a week. Four to six times a week.

19 Q. And how long would those minutes -- how long would those  
20 meetings usually last in minutes?

21 A. Oh, five minutes.

22 Q. Were you paid separately for your meetings with the driver  
23 coordinator?

24 A. No.

25 Q. Did anyone at Wal-Mart ever tell you that the meetings

## ALLRED - DIRECT / MARTINEZ

1 with the driver coordinator were part of an arrive or a drop?

2 A. No.

3 Q. Were you ever told that they were part of a hook or a  
4 depart?

5 A. No.

6 Q. Were you ever told that the driver coordinator meetings  
7 were a part of any of the activities listed in your pay manual?

8 A. No.

9 Q. In your usual work duties, do you usually perform a first  
10 pre-trip inspection at the beginning of your day?

11 A. Yes.

12 Q. How often would you perform a first daily pre-trip?

13 A. About six times a week.

14 Q. And during your pre-trip inspection, what would you  
15 usually do? What would pre-trip consist of?

16 A. I would walk around the trailer and the truck and make  
17 sure everything -- the tires all had air and there was no flats  
18 and make sure there was no leaks from the -- coming from the  
19 trailer or make sure the whole thing was safe and roadworthy.

20 Q. How long was the trailer?

21 A. The trailer was 53 feet. Attached to the truck, it was 75  
22 feet.

23 Q. So a 50-foot trailer --

24 A. 53 feet --

25 Q. 53. Attached to --

## ALLRED - DIRECT / MARTINEZ

1     **A.**     Attached to the tractor, it would have made it a total of  
2     75 feet from the front of the truck to the back of the trailer.

3     **Q.**     75 feet. I know there are supposed to be 18 wheels, but  
4     that's as close as I can get to --

5     **A.**     We can -- we can imagine.

6     **Q.**     Okay. And how long did it usually take you to perform  
7     that first daily pre-trip?

8     **A.**     Fifteen minutes.

9     **Q.**     And how often would you do that first pre-trip inspection  
10    of the day?

11    **A.**     How many times during my week that I work -- it was once  
12    a -- once a day, every morning for six days that I worked.

13    **Q.**     And this pre-trip inspection here of the 75-foot tractor  
14    and trailer, did that ever take you approximately two to three  
15    minutes?

16    **A.**     No. No. You couldn't possibly do -- no. It would  
17    take -- maybe if you jogged around the truck, you could do  
18    that, but then you wouldn't be really inspecting it.

19    **Q.**     You said if you jogged around the trailer, maybe you could  
20    make it around in three minutes, but then you wouldn't be  
21    inspecting it. Why do you say that?

22    **A.**     Well, the job was to inspect it and make sure that it was  
23    safe to take out on the highway before you started driving, and  
24    if you weren't looking at everything, it would take you a lot  
25    longer to do that than a minute or two.

## ALLRED - DIRECT / MARTINEZ

1 Q. Were you ever told that you were -- that that first  
2 pre-trip inspection of the day was a part of any of the  
3 activities listed in your pay manual?

4 A. No.

5 Q. Were you ever told that that first pre-trip inspection was  
6 part of a depart?

7 A. No.

8 Q. When you said 15 minutes to conduct a pre-trip inspection,  
9 do you think that perhaps your memory has faded and that maybe  
10 it wasn't 15 minutes?

11 A. No. I don't -- not at all.

12 Q. In your usual work duties, did you usually perform a daily  
13 post-trip inspection of your trailer at the end of the day?

14 A. Every day.

15 Q. And how long would a post-trip usually take?

16 A. The same, 15 minutes, to make certain that it was all  
17 roadworthy and safe.

18 Q. And can you tell me where your truck was usually located  
19 when you performed that last post-trip of the day?

20 A. At a truck stop or safe haven. Somewhere off the road.  
21 Wherever I was going to spend the night.

22 Q. Were you paid separately for your last post-trip  
23 inspection of the day?

24 A. No.

25 Q. Were you ever told that that last post-trip inspection was

## ALLRED - DIRECT / MARTINEZ

1 a part of any of the activities listed in your pay manual?

2 A. No.

3 Q. Did Wal-Mart require you to wash your truck?

4 A. Yes.

5 Q. How did you learn of this requirement?

6 A. When they took out the -- well, when they got rid of the  
7 washers, they had people hired to wash your trucks, and they  
8 got rid of those, and they put in a truck wash in the  
9 distribution center. And then they said it was up to us to  
10 wash the trucks and the trailers.

11 Q. And how often were you required to wash it?

12 A. Once a week.

13 Q. When you would wash your truck, how long in minutes would  
14 it usually take?

15 A. Fifteen minutes to a half hour.

16 Q. Did you ever complain to management about having to wash  
17 the truck?

18 A. I did. I did. One time I had an occasion to go in to see  
19 our GTM and the safety manager. Rick Norton was the safety  
20 manager and Mike Baker was our GTM. And while I was there at  
21 this meeting, he -- the topic of my truck not being clean was  
22 brought up. And he said to me, "Well, it says right up here in  
23 the pay manual, in the policy book, that you are to wash your  
24 truck once a week." And I said to him -- I said, "I think  
25 state law trumps Wal-Mart policy because," I said, "you don't

**ALLRED - DIRECT / MARTINEZ**

1 even have the right to ask me to do anything without  
2 compensating me for it," and I said, "You don't pay us to wash  
3 these trucks."

4 And I said, "I've got a very good idea on how to save  
5 Wal-Mart money." I said, "Why don't we get rid of the janitors  
6 that clean the bathrooms and the office and the drivers' room  
7 out there," and I said, "We will just eliminate those jobs,"  
8 and I says, "When the driver coordinators leave to go home,  
9 they can go punch the time card, but before they go home, they  
10 must come back in and clean these rooms in the bathroom," and I  
11 said, "Then they can go home and we can save that money." I  
12 said, "That's exactly what you're asking us drivers to do, is  
13 to wash these trucks on our own time before we can go home."

14 **Q.** You said you said this to Rick Norton and Mike Baker?

15 **A.** Baker. GTM, uh-huh.

16 **Q.** You said Mike Baker was your GTM?

17 **A.** Yes.

18 **Q.** Who was Rick Norton?

19 **A.** He was our safety manager at that time.

20 **Q.** And when you -- when you communicated all of this to Rick  
21 Norton and Mike Baker, what did they say in response?

22 **A.** They said nothing. They just kind of gave me that  
23 deer-in-the-headlight look like maybe she's right.

24 **Q.** Did Mr. Baker tell you that you were actually being  
25 compensated for --

## ALLRED - DIRECT / MARTINEZ

1     **A.**    No.

2     **Q.**    -- washing your truck?

3     **A.**    He never said a word.  I thought if we were going to be  
4     paid that -- if we were being paid for that, that would have  
5     been a perfect opportunity to say, "Why, we are paying you."  
6     But he did not.  He just sat there very quiet and never said  
7     another word.

8     **Q.**    Did either of these two gentlemen tell you that washing  
9     your truck was part of a hook or a drop?

10    **A.**    No.  They didn't, no.

11    **Q.**    Throughout your employment -- well, actually let me ask a  
12    different question.

13           Having had that meeting with them and communicating your  
14    stance on washing the truck, did you continue to wash your  
15    truck after that?

16    **A.**    I did.

17    **Q.**    Why?

18    **A.**    Well, because I was kind of humiliated into it because one  
19    day one of the ops managers -- her name is Janell Walton --  
20    came out into the office, out into the driver's room where I  
21    was sitting and said, "Don't you have any pride in your ride?"  
22    You know, like, *aren't you ashamed that you're driving such a*  
23    *dirty truck?*

24    **Q.**    And so you felt that you had to wash it --

25    **A.**    I felt like I probably should, yeah.

## ALLRED - DIRECT / MARTINEZ

1 Q. So you continued to wash it after your meeting with --

2 A. I did.

3 Q. -- with these two gentleman?

4 A. I did.

5 Q. Throughout your employment with Wal-Mart, were you ever  
6 told that the policy had changed and you were actually not  
7 required to wash your truck?

8 A. No.

9 Q. In your usual work duties, did you ever have to take a  
10 layover?

11 A. Yes.

12 Q. How often during a workweek would you take a layover?

13 A. I -- every night -- six nights a week.

14 Q. And were you required to take your layovers inside your  
15 tractor?

16 A. Yes.

17 Q. How did you learn of that requirement?

18 A. That was communicated to us in orientation. They gave us  
19 the tractors with the big sleepers. That's where we had to  
20 sleep and take our layover.

21 Q. Were you required to get permission in order to take your  
22 layover somewhere other than the tractor?

23 A. Yes.

24 Q. Did you ever request permission?

25 A. No.



**ALLRED - CROSS / CONWAY**

1     **Q.**     Why not?

2     **A.**     Well, because that was just part of my job, stay with the  
3     truck and stay with the load.

4     **Q.**     Throughout your employment with Wal-Mart, did anyone ever  
5     tell you that you no longer needed to stay with your tractor  
6     during the layover?

7     **A.**     No.

8     **Q.**     How long were your layovers?

9     **A.**     Ten hours.

10    **Q.**     And did you receive pay for layovers taken inside your  
11    truck?

12    **A.**     Yes.

13    **Q.**     How much?

14    **A.**     Forty-two dollars.

15            **MS. MARTINEZ:** I have no further questions,  
16    Your Honor.

17            **THE COURT:** Thank you. Ms. Conway.

18            **MS. CONWAY:** Thank you.

19                            **REBUTTAL EXAMINATION**

20    **BY MS. CONWAY:**

21    **Q.**     You never gave a deposition in this case, did you?

22    **A.**     No.

23    **Q.**     You have never been interviewed by any of the plaintiffs'  
24    experts in this case; is that right?

25    **A.**     Any who?

**ALLRED - CROSS / CONWAY**

1     **Q.**    You never talked to any of the experts in this case; is  
2     that correct?

3     **A.**    Experts?

4     **Q.**    Yes.

5     **A.**    No.

6     **Q.**    Have you ever talked to a Dr. Phillips?

7     **A.**    Dr. Phillips?

8     **Q.**    Yes.

9     **A.**    No.

10    **Q.**    You worked for Wal-Mart for 18 years; is that correct?

11    **A.**    Yes.

12    **Q.**    You retired from Wal-Mart; is that correct?

13    **A.**    Yes.

14           **MS. CONWAY:** Thank you. No further questions.

15           **THE COURT:** Thank you. Anything else?

16           **MS. MARTINEZ:** Nothing else.

17           **THE COURT:** May the witness be excused?

18           **MS. MARTINEZ:** Yes, Your Honor.

19           **THE COURT:** Thank you very much, ma'am. You are  
20    excused.

21           The plaintiffs may call their next witness.

22           **MR. WAGNER:** Your Honor, the plaintiffs would call  
23    Mr. Ed Parrish.

24           **THE COURT:** All right.

25           **THE CLERK:** Raise your right hand.

**PARRISH - DIRECT / WAGNER**

1 **EDMOND PARRISH,**

2 called as a witness for the Plaintiff, having been duly sworn,  
3 testified as follows:

4 **THE CLERK:** Please state your full name for the  
5 record.

6 **THE WITNESS:** Ed Parrish Jr., P-A-R-R-I-S-H.

7 **THE COURT:** Mr. Wagner.

8 **REBUTTAL EXAMINATION**

9 **BY MR. WAGNER:**

10 **Q.** Good afternoon, Mr. Parrish.

11 **A.** Good afternoon.

12 **Q.** You know who I am. You have been sitting in court during  
13 the entire trial?

14 **A.** That's correct.

15 **Q.** What is your job title with Wal-Mart?

16 **A.** I'm the Human Resources Director for Transportation  
17 Division.

18 **Q.** Is that for the entire country?

19 **A.** Yes, that is.

20 **Q.** And your office is in Arkansas?

21 **A.** In Bentonville, Arkansas, yes.

22 **Q.** How long have you been employed by Wal-Mart?

23 **A.** About for 17 years.

24 **Q.** How long have you been the Human Resource Director for  
25 Transportation?

## PARRISH - DIRECT / WAGNER

1     **A.**    For about 15 years.

2     **Q.**    Fifteen?

3     **A.**    Yes.

4     **Q.**    Okay.  Thank you.

5            So what are some of the things you do as a -- what are  
6     you -- what are your responsibilities as the Human Resource  
7     Director?

8     **A.**    I'm responsible for recruiting and hiring our Wal-Mart  
9     truck drivers, as well as helping with some of the  
10    administration of our pay guidelines.

11    **Q.**    Okay.  And as far as your pay guidelines go, do you --  
12    does Wal-Mart keep any records as to how often the trucks are  
13    washed by the truck drivers?

14    **A.**    Not that I'm aware of.

15    **Q.**    Okay.  Do you know why they don't do that, why they don't  
16    keep records of that?

17    **A.**    I can't tell you that.

18    **Q.**    Does Wal-Mart keep any records as to how often and how  
19    long the truck drivers do their pre-trip inspections?

20    **A.**    Not that I'm aware of.

21    **Q.**    Do you know why they don't keep records of that?

22    **A.**    I can't tell you that.

23    **Q.**    What about the same question for post-trip inspections?  
24    Does Wal-Mart keep any records of how long or how often the  
25    truck drivers do their post-trip inspections?

**PARRISH - CROSS / EDELMAN**

1     **A.**    Not that I know of.

2     **Q.**    Do you know why they don't keep records of such?

3     **A.**    No, I don't.

4     **Q.**    What about fueling the vehicles, the tractors? Does  
5     Wal-Mart keep a record of how often the vehicles are fueled and  
6     how -- or how long it takes?

7     **A.**    I'm not aware of that. I don't work in that area so I  
8     wouldn't know about the records they would keep for fueling.

9     **Q.**    Okay. Now, are you aware of any pay bulletins or  
10    newsletters that truck drivers have received at any time since  
11    2001 advising them of any changes in the pay manuals?

12    **A.**    Anything specific that -- that you have in mind?

13    **Q.**    Anything advising the drivers of any changes regarding the  
14    layover rules?

15    **A.**    Not that I'm aware of.

16           **MR. WAGNER:** I don't have anything further. Thank  
17    you, sir.

18           **THE COURT:** Thank you.

19           Mr. Edelman.

20                           **REBUTTAL EXAMINATION**

21    **BY MR. EDELMAN:**

22    **Q.**    Good afternoon, Mr. Parrish.

23    **A.**    Hello, sir.

24    **Q.**    Would you -- I want to ask you a few questions. I will  
25    confess that after three weeks in trial, my outline is a lot

1 shorter than it might otherwise have been had you testified  
2 earlier.

3 But would you give the jury a little bit of background on  
4 you. For example, where you grew up, your family, etc.

5 **A.** I'm from the State of Tennessee, a little place -- if you  
6 know the geography of Tennessee around Memphis, Tennessee, 75  
7 miles north of Memphis, and I grew up with a family of eight --  
8 six children, five boys, one girl -- and my dad was a  
9 construction worker while I was -- up through my teenage years,  
10 and my mom also was a worker in one of the local factories in  
11 that town.

12 My dad was -- I say construction worker. He built bridges  
13 and worked with heavy equipment and also he drove trucks with  
14 that equipment.

15 He oftentimes would come by or take me to work with him on  
16 a weekend or what have you, and I would have opportunity to  
17 ride with him in the truck, and I thought that was something  
18 grand and great as a small kid, a small boy, following along  
19 behind his dad.

20 **Q.** And how about your family? Do you have kids?

21 **A.** I have kids, yes.

22 **Q.** How many kids do you have?

23 **A.** I have three children.

24 **Q.** Any grandchildren?

25 **A.** I have one. One daughter -- granddaughter that is four

1 years old.

2 **Q.** Okay. And in terms of your employment background, can you  
3 spend a couple minutes -- not a couple minutes. But just a few  
4 moments to tell us about your employment background before you  
5 got to Wal-Mart.

6 **A.** Yes. I worked with the retail company called Service  
7 Merchandise Company. It was based out of Nashville, Tennessee.  
8 I started with that company about two weeks after I graduated  
9 college which I attended in Nashville, Tennessee called  
10 Vanderbilt University. I started at the very bottom, coming  
11 out of college in sporting goods and toys, just learning that  
12 business. And after about a year, I moved into the human  
13 resources area, and eventually -- eventually received a  
14 regional level job working in human resources where I had a  
15 number of stores that I covered over the region of the  
16 United States.

17 And then eventually was promoted to the system  
18 vice-president of human resources in that division, working  
19 with stores all across -- with distribution centers and stores  
20 across the country.

21 After spending about 20 years with that company, it fell  
22 on some economic hard times, and I talked with Wal-Mart and  
23 became a part of the Wal-Mart family.

24 **Q.** All right. There are a few things I want to ask you  
25 about, just a couple of things that were said early in the case

1 that I want to follow up on with you.

2 You have been in the courtroom for the whole trial; right?

3 **A.** That is correct.

4 **Q.** Do you remember one of the first, if not the first,  
5 witnesses in this case, a gentleman by the name of  
6 Mr. Franklin?

7 **A.** Yes. I remember.

8 **Q.** All right. And do you remember that Mr. Franklin was  
9 testifying -- testified about a driver who was stabbed in a  
10 rest area in a place called Delano?

11 **A.** Yes, I remember that.

12 **MR. WAGNER:** Objection, Your Honor. It's outside the  
13 scope.

14 **THE COURT:** Overruled.

15 You may answer.

16 **BY MR. EDELMAN:**

17 **Q.** When he said that in court, was that the first you had  
18 ever heard of that?

19 **A.** Yes, it was.

20 **Q.** After he said that, did you research the issue to find out  
21 if that event had actually taken place?

22 **A.** Yes, I did.

23 **Q.** What did you determine?

24 **MR. WAGNER:** Objection. Hearsay. Lack of foundation.

25 **THE COURT:** Well, I don't know about the foundation.



1 It does call for hearsay, so you will have to lay a foundation.

2 **BY MR. EDELMAN:**

3 **Q.** Did you review Wal-Mart's business records, incident  
4 reports, and the like to determine whether Wal-Mart had any  
5 kind of record of that event having taken place?

6 **A.** Yes. We made contact with the department that would have  
7 those types of records.

8 **Q.** All right. What did you learn from that inquiry?

9 **A.** We learned that --

10 **MR. WAGNER:** Objection. Hearsay.

11 **THE COURT:** Sustained.

12 **BY MR. EDELMAN:**

13 **Q.** Let me ask it a different way.

14 From your -- from the records that you reviewed and the  
15 research that you did, putting aside conversations with people,  
16 did you find any evidence to support the idea that there was  
17 the stabbing that Mr. Franklin testified to?

18 **MR. WAGNER:** Objection. Hearsay and leading.

19 **THE COURT:** Overruled.

20 That's just a yes or a no.

21 **THE WITNESS:** No. I found no evidence.

22 **BY MR. EDELMAN:**

23 **Q.** You found no evidence?

24 **A.** No evidence.

25 **Q.** All right. Under Wal-Mart procedure, if something like

## PARRISH - CROSS / EDELMAN

1 that had happened to a driver, would Wal-Mart, in the normal  
2 course, document an event like that?

3 A. Yes, they would.

4 Q. Was there any documentation of that?

5 A. There was no evidence -- no documentation found.

6 Q. All right. And also I want to ask you about -- do you  
7 remember a gentleman by the name of Mr. Morzini who testified  
8 in the trial?

9 A. Yes, I do.

10 Q. Do you remember that he said there was a driver who had  
11 been terminated for staying at home on a layover without  
12 permission?

13 A. Yes, I do.

14 Q. And he identified that person as somebody by the name of  
15 Dick Poston?

16 A. That's correct.

17 Q. And was Mr. Poston in fact terminated for staying at home  
18 on a layover without permission?

19 A. No, he was not.

20 Q. And what was he terminated for?

21 A. He was terminated for using profanity.

22 Q. All right. And, by the way, when did this happen?

23 A. It happened in May of 1999.

24 Q. Outside of the class period, in any event.

25 A. That's correct.

1 Q. All right.

2 May I approach the witness, Your Honor?

3 THE COURT: Sure.

4 BY MR. EDELMAN:

5 Q. Can you identify for us, please, the document that you are  
6 looking at.

7 A. Yes. This is an exit interview form --

8 MR. WAGNER: Your Honor, he is reading from a document  
9 that is not in evidence, and I don't even know what he was  
10 given.

11 MR. EDELMAN: I'm sorry, counsel. My apologies.

12 MR. WAGNER: Thank you.

13 THE COURT: Don't read from it. You can identify it  
14 for us.

15 THE WITNESS: Yes.

16 BY MR. EDELMAN:

17 Q. Just tell us what this document is.

18 A. This is an exit interview form.

19 Q. And this is -- does Wal-Mart have a standard form that is  
20 filled out when an employee exits the company?

21 A. Yes. That's correct.

22 Q. Or when a driver does?

23 A. Right.

24 Q. And is this such a form?

25 A. Yes, it is.

**PARRISH - CROSS / EDELMAN**

1     **Q.**   And is this maintained by Wal-Mart in the ordinary course  
2     of business?

3     **A.**   That's correct.

4     **Q.**   Were you able to retrieve this form by going to Wal-Mart's  
5     files to look up the circumstance under which Mr. Poston left  
6     Wal-Mart?

7     **A.**   That's correct.

8             **MR. EDELMAN:** Move the admission of Exhibit -- I'm  
9     sorry. I think I gave you, Your Honor, the one that has the  
10    tab.

11            **THE COURT:** 663.

12            **MR. EDELMAN:** 663.

13            **THE COURT:** Any objection?

14            **MR. WAGNER:** Yes, Your Honor. Several. May we have a  
15    sidebar quickly.

16            **THE COURT:** Okay.

17            (The following proceedings were heard at the sidebar:)

18            **MR. WAGNER:** First of all, Mr.-- the witness didn't do  
19    anything with this record, for one. Okay. So it's hearsay.  
20    And there is also a relevance issue, and there is this -- this  
21    is a third party who is not present here. There has been no  
22    inquiry from Mr. Poston for authority for Wal-Mart to publish  
23    this, make it a public record --

24            **THE COURT:** Was his name testified to?

25            **MR. EDELMAN:** Yes, Your Honor.

1           **MR. WAGNER:** He may have been, but this is a record  
2 regarding his privileged employment matters, and he should be  
3 allowed to at least be given notice of this as to whether or  
4 not it can be published in this case. It's a matter of whether  
5 or not -- I guess the reasons for his termination. And it is  
6 hearsay.

7           **THE COURT:** It's a business record.

8           **MR. WAGNER:** It -- okay. It might be a business  
9 record, but he can't identify this as being a business record.

10          **THE COURT:** He just did.

11          **MR. WAGNER:** Well, he wasn't employed at that time.  
12 What year was this? '99. He wasn't even employed by Wal-Mart  
13 at that time.

14          **THE COURT:** He is head of HR.

15          **MR. EDELMAN:** Indeed.

16          **THE COURT:** Well, if those are the objections, they  
17 are overruled.

18          **MR. WAGNER:** Okay.

19          **MR. SALTZMAN:** Also, Your Honor, are we just -- this  
20 is a completely opening of the case. This has nothing to do  
21 with anything that was testified to.

22          **THE COURT:** That is overruled, too.

23                   (Sidebar conference ended.)

24          **MR. WAGNER:** We will withdraw our objection.

25          **THE COURT:** All right. Thank you. It's received.

**PARRISH - CROSS / EDELMAN**

1 (Trial Exhibit 663 received in evidence).

2 **MR. EDELMAN:** Thank you, Your Honor. May we publish  
3 it?

4 **THE CLERK:** On the computer? So it's up.

5 **MR. EDELMAN:** We're good. I'm just going to spend a  
6 second on this.

7 **Q.** Tell us what this is, please, Mr. Parrish.

8 **A.** This is an exit interview form. It's a form that is used  
9 when an associate is terminated from the company or leaves the  
10 company.

11 **Q.** This is for Richard Poston?

12 **A.** Richard Poston.

13 **Q.** The person Mr. Franklin testified about?

14 **A.** Yes. That's the one.

15 **Q.** If we scroll down to the bottom, it shows the reason for  
16 the termination.

17 **A.** Yes. That's the explanation for the termination for  
18 Mr. Poston.

19 **Q.** It doesn't say anything about being terminated for taking  
20 a layover at home without getting authorization?

21 **A.** No, it does not.

22 **Q.** Under Wal-Mart's procedure, is the explanation of the  
23 termination expected to correspond to the reason why somebody  
24 is terminated?

25 **A.** That is correct.

1 Q. All right. Beyond this explanation, do you know anything  
2 about the circumstances of the profanity, how bad it was, what  
3 the circumstances were, anything like that?

4 A. No, I do not. This was done in 1999, and this is the exit  
5 interview form, and that's all that I know.

6 Q. Okay. Are you familiar with the turnover rate for  
7 Wal-Mart drivers?

8 A. Yes, I am.

9 Q. And what is it?

10 A. If you look at the last ten years, our turnover rate has  
11 averaged 5.5 percent.

12 Q. And in your capacity as Human Resources Director for  
13 Transportation, are you familiar with the turnover rate for  
14 drivers in the trucking industry?

15 A. Yes, I am.

16 MR. WAGNER: Objection. Relevance.

17 THE COURT: Sustained.

18 BY MR. EDELMAN:

19 Q. What does Wal-Mart do to keep its turnover rate so low?

20 MR. WAGNER: Objection. Calls for speculation.

21 THE COURT: Sustained.

22 MR. EDELMAN: On that ground?

23 THE COURT: Yes.

24 MR. EDELMAN: All right.

25 Q. Well, you're director of Human Resources?

**PARRISH - CROSS / EDELMAN**

1     **A.**     That's correct.

2     **Q.**     For all drivers in the United States?

3     **A.**     That's correct.

4     **Q.**     Do you have firsthand experience with what Wal-Mart does  
5     to retain its drivers at a turnover rate of 5.5 percent over  
6     the last ten years?

7     **A.**     Yes, I do.

8     **Q.**     How do you have that experience?

9             **MR. WAGNER:** Objection. Relevance -- it's speculation  
10    as why people stay or leave.

11            **THE COURT:** Overruled.

12            You can answer that question.

13            **THE WITNESS:** Well, I know that drivers, new drivers  
14    that we hire, tell us they come to our company because --

15            **MR. WAGNER:** Objection. Now it's hearsay. The  
16    response --

17            **THE COURT:** Well, it's not for the truth. We don't  
18    really know if what the drivers tell him is true or not true.  
19    It's to demonstrate what they told and perhaps to reflect their  
20    state of mind.

21            With that limited understanding, you can answer the  
22    question.

23            **THE WITNESS:** Yes. We provide our drivers with a form  
24    after about three months of coming aboard with our company, and  
25    the drivers tell us that they come to -- they've come to our



1 company because of the pay. They come to our company because  
2 of how we treat them. We treat them well. And one of the --  
3 found out one of the surprises to our drivers as to why they  
4 come is that they don't have to handle the freight. No  
5 unloading, no loading of freight. The only thing that we ask  
6 our drivers to do is simply drive the truck. And that was  
7 seemingly one of the major surprises to drivers coming to our  
8 company.

9 The other thing that happens, we offer a fantastic benefit  
10 package for our drivers and their families from healthcare  
11 through major medical to dental insurance, vision insurance.  
12 Offer a 401K plan that helps drivers in planning their future  
13 for themselves and their families. Our 401K program pays --  
14 pays our drivers a dollar per dollar for the contributions that  
15 they make to the plan.

16 We have vacation and other paid time off programs that  
17 entice our drivers, and it becomes competitive in the market,  
18 and they tell us that these programs are good.

19 I've talked directly to new hires out there in the market  
20 with our new hire drivers. I work with our recruiting team, so  
21 I have direct knowledge of what new drivers are telling us as  
22 to why they come and they are attracted to Wal-Mart.

23 **BY MR. EDELMAN:**

24 **Q.** Is it important to Wal-Mart to retain its drivers?

25 **A.** Yes, it is important to retain our drivers.

## PARRISH - CROSS / EDELMAN

1 Q. Is it important to Wal-Mart to treat its drivers fairly?

2 A. Yes, it is.

3 Q. Are Wal-Mart's drivers important to the company?

4 A. Yes, they are.

5 Q. Why?

6 A. Because we're in the business -- in the transportation  
7 business for moving freight for the purposes of serving our  
8 customers, and our drivers are the ones that are on the front  
9 lines who is helping us do that. So we treat them with great  
10 respect and we treat them as a very important asset and very  
11 important reason why our customers are served.

12 Q. You were here at the beginning of this case when  
13 Mr. Wagner gave his opening statement?

14 A. That's correct.

15 Q. In your view, sir, does Wal-Mart cheat its drivers?

16 A. No, sir. In my view, Wal-Mart does not cheat its drivers.  
17 As a matter of fact, we do just the opposite. We try to do  
18 everything that we can to support our drivers in treating them  
19 fairly, treating them with respect and dignity. As a matter of  
20 fact, if I thought that Wal-Mart was cheating its drivers, I  
21 would not be sitting here in this seat today.

22 Our -- our drivers are assets to our company, and we treat  
23 them that way. If I thought that -- if -- if we treated them  
24 any other way, we would be like the other companies where our  
25 turnover rates would be in the 80s, 90s and 100 percent. We

**PARRISH - REDIRECT / WAGNER**

1 don't have that problem. Our drivers stay with us. The only  
2 reason that -- 50 percent of what that 5.5 percent that I  
3 talked to you about earlier --

4 **Q.** The turnover rate?

5 **A.** The turnover rate. 50 percent of that is -- are the  
6 turnovers because our drivers retire or our drivers are ill or  
7 it's death, and so our turnover is very, very low. And if we  
8 treated them badly, I don't think they would stay around.

9 **Q.** So you're saying that even of the 5.5 percent turnover  
10 rate, half of that is attributable to retirements in the  
11 ordinary course?

12 **A.** That's correct.

13 **MR. EDELMAN:** Thank you, Mr. Parrish.

14 **THE COURT:** Anything else, Mr. Wagner.

15 **MR. WAGNER:** Briefly, Your Honor.

16 **REBUTTAL EXAMINATION**

17 **BY MR. WAGNER:**

18 **Q.** Mr. Parrish, Mr. Edelman just showed you, it looked like,  
19 some kind of exit interview form or termination form for a  
20 driver from 1999, Mr. Poston?

21 **A.** Yes. That's correct.

22 **Q.** Do you have Mr. Willie Franklin's exit interview or  
23 termination form?

24 **A.** No, I do not.

25 **Q.** You were in court when he testified; right?

## PARRISH - REDIRECT / WAGNER

1     **A.**    Yes, I was.

2     **Q.**    He testified that he was terminated for being found  
3     spending part of his layover inside the truck stop as opposed  
4     to be inside his cab; correct?

5           **MR. EDELMAN:**  Objection.  Misstates prior testimony,  
6     Your Honor.

7           **THE COURT:**  Well, you can ask him the question and  
8     if --

9     **BY MR. WAGNER:**

10    **Q.**    Do you remember that testimony?

11    **A.**    I remember him saying that he was terminated for some  
12    reason, yes.

13    **Q.**    Okay.  Do you remember that reason being outside of the  
14    cab when one of the Wal-Mart spotters saw him?

15    **A.**    I -- I assume that's what he testified for -- on.

16    **Q.**    And you were the Human Resource Director at the time he  
17    was fired?

18    **A.**    I'm not sure exactly when he was fired.  I don't know  
19    Mr. Franklin.

20    **Q.**    Okay.  And you don't have his termination form?

21    **A.**    No, I do not have his termination form.

22    **Q.**    Mr. Franklin testified that he was terminated for not  
23    being in the sleeper berth and he was inside the truck stop  
24    getting groceries.  Do you remember that testimony?  This was  
25    during his layover?

**PARRISH - RECROSS / EDELMAN**

1     **A.**    Yes.  I remember him -- his testimony that he was  
2     terminated, but I'm not sure exactly the wording that is used,  
3     but if that's what it says there and you are explaining it to  
4     me, I hear you.

5     **Q.**    Do you have any reason to believe that isn't true, that  
6     that was why he was terminated?

7     **A.**    I have no idea why he was terminated, so therefore I can't  
8     come comment on that.  I have no background.

9             **MR. WAGNER:**  Thank you.  I don't have anything  
10    further.

11            **THE COURT:**  Mr. Edelman?

12            **MR. EDELMAN:**  One moment, Your Honor.  Please.

13            (Defense counsel confer off the record.)

14                                **REBUTTAL EXAMINATION**

15    **BY MR. EDELMAN:**

16    **Q.**    So, Mr. Parrish, do you remember Mr. Franklin?

17    **A.**    Yes, I do.

18    **Q.**    He said a lot of things; right?

19    **A.**    Yes, he did.

20    **Q.**    Okay.  Do you remember on -- do you remember anything  
21    about the cross-examination of Mr. Franklin?

22    **A.**    Yes, I do.

23    **Q.**    Do you remember that Mr. Franklin acknowledged that he was  
24    terminated for falsifying his log and saying that he had spent  
25    the night in his sleepover berth when, in fact, he had not?

1           **MR. WAGNER:** Objection. Leading and misstates the  
2 testimony. But it's also leading.

3           **THE COURT:** Well, I'll overrule the leading objection,  
4 and you'll have to -- if you're going to tell me it misstates  
5 it, you've got it there, and you're going to have to  
6 demonstrate that. So I'll let the witness answer. I don't  
7 know what he remembers, but I'm going to deny your objection  
8 unless you demonstrate to the contrary.

9           If you remember the question, sir, and you know the  
10 answer, you can provide it.

11           **THE WITNESS:** Would you restate the question?

12           **BY MR. EDELMAN:**

13           **Q.** All right. If you don't remember it, it's all right  
14 because the record will speak for itself. But do you remember  
15 Mr. Franklin's testimony about how he stated in his log that he  
16 had slept in the sleeper berth when in fact he had slept at a  
17 DC?

18           **A.** I remember him stating that he was out of his sleeper  
19 berth and had fallen asleep in some other location, but I don't  
20 remember exactly why he was terminated.

21           **Q.** All right. We're just trying to locate his termination  
22 notice. I don't know if we have it right now, but give me just  
23 one second, please.

24           I don't have copies of the document I would like the  
25 witness to authenticate. Can I show it just to him?

## PARRISH - RECROSS / EDELMAN

1           **THE COURT:** Sure. You can have it --

2           **THE CLERK:** It's different.

3           **MR. EDELMAN:** May I approach the witness, Your Honor?

4           **THE COURT:** You may.

5           **THE CLERK:** What document is it?

6           **MR. EDELMAN:** I'm sorry. Here are two copies of

7 Defendant's Exhibit 591. It's in evidence already.

8           **THE CLERK:** Hold on. 591 is -- 10/31 it was admitted.

9           **MR. EDELMAN:** Great. Let's pull it up on the screen,  
10 please.

11       **Q.** Is this another one of the exit interviews like the one we  
12 saw for Mr. Poston?

13       **A.** Yes. This is the same form, similar form.

14       **Q.** And then this relates to Mr. Franklin?

15       **A.** Yes. It has his name on it, Willie Franklin.

16       **Q.** And then it gives the reasons for the termination?

17       **A.** Yes, it does.

18       **Q.** Can you read out loud what that says?

19       **A.** It says "gross misconduct on 8/28/08."

20       **Q.** "Willie -- Willie keyed" --

21       **A.** "Willie keyed for pay for layover in the cab of the truck  
22 but was found that he did not stay in the truck."

23       **Q.** All right. So --

24       **A.** I think that's what it says.

25       **Q.** All right. So he keyed in to get layover pay for staying

1 in the truck when he didn't in fact stay in the truck?

2 A. That's what it says.

3 Q. I want to show you a page from the 2001 -- and is that a  
4 basis for terminating an employee when they falsify an entry in  
5 their log?

6 A. Yes. It would be an integrity issue.

7 Q. And I'm going to try to switch the ELMO.  
8 Tracy, if I could, please.

9 THE COURT: Tracy, the ELMO.

10 THE CLERK: Okay. Here we go.

11 BY MR. EDELMAN:

12 Q. All right. Now, this is from the Driver Pay Manual for  
13 January of 2001.

14 A. Yes, sir.

15 Q. And I want to read your -- I would ask you to read the  
16 sentence in the second paragraph that -- I'm going to highlight  
17 it for you and then ask you to read it out loud.

18 This is from, I believe, Exhibit 1. Can you read that  
19 sentence aloud, please?

20 A. "Deliberate falsification of pay records or falsely  
21 reporting pay activity to gain additional pay can result in  
22 termination."

23 Q. And is falsifying your pay log to key in that you were in  
24 the sleeper berth when you, in fact, were not a basis for  
25 termination under this policy that you just read out loud?



**PARRISH - FURTHER REDIRECT / WAGNER**

1     **A.**    Yes, sir.

2     **Q.**    Thank you.

3           Is there a relationship between any requirements of pay  
4   logs or driver's logs being accurate in Department of  
5   Transportation regulations?

6     **A.**    Yes.  You have to log exactly the way that you work for  
7   that day or week, and those logs are checked, audited to make  
8   sure that you are actually running according to DOT  
9   regulations, driving according to DOT regulations.

10    **Q.**    And DOT regulations require that drivers accurately  
11   record -- accurately and truthfully record sleeper berth time?

12           **MR. WAGNER:**  Objection.  Leading.

13           **THE COURT:**  Overruled.  You may answer.

14           **THE WITNESS:**  Yes.  You have to record on-duty time,  
15   off-duty time, or sleeper berth time or any combination of  
16   those times so that it's a matter of record for DOT on the DOT  
17   regulations --

18           **MR. EDELMAN:**  Thank you.

19           Nothing further, Your Honor.

20           **THE COURT:**  Thank you.

21           **MR. WAGNER:**  Yes, Your Honor.

22           **THE COURT:**  Mr. Wagner.

23           **MR. WAGNER:**  Yes.

24                           **REBUTTAL EXAMINATION**

25

## PARRISH - FURTHER REDIRECT / WAGNER

1 **BY MR. WAGNER:**

2 **Q.** So Willie Franklin was taking a layover, supposedly, in  
3 the tractor cab; right? Is that your understanding of the  
4 circumstances on the night he was terminated?

5 **A.** He was taking a layover. I don't know exactly where.

6 **Q.** And did he get authority that night by his management to  
7 take his layover somewhere other than the truck?

8 **A.** Sir, I do not know Willie Franklin. I do not know of that  
9 circumstance so I can't answer that question.

10 **Q.** Weren't you the Human Resource Manager in 2008 when he was  
11 fired?

12 **A.** Sir, I have responsibilities for 92 facilities, 71 where  
13 drivers are located, and these types of issues wouldn't raise  
14 up to my level.

15 **Q.** But you certainly have -- those are records that certainly  
16 you have access to; correct?

17 **A.** These are records from each of those locations, and I  
18 would have no reason to go and search for those records unless  
19 there was an issue laid on my desk.

20 **Q.** So Willie Franklin had said he was going to take his  
21 layover in the cab, and he was caught outside of the cab, and  
22 that's why he was fired; right?

23 **A.** I don't know. Here's the record here. I can read it to  
24 you.

25 **Q.** Well, I have it here, I believe.

**PARRISH - FURTHER REDIRECT / WAGNER**

1 Do you have an extra copy?

2 It says -- you didn't write this, did you? It says -- did  
3 you write this, Mr.--

4 **A.** Sir, I don't know Willie Franklin.

5 **Q.** I mean, did you write this? Did you write this document?  
6 Is that your handwriting?

7 **A.** No, that's not my handwriting.

8 **Q.** Well, it says, "Gross misconduct on," it says the date,  
9 "8/28/08. Willie" -- what does that say, that word? Do you  
10 know?

11 **MR. EDELMAN:** Keyed.

12 **THE WITNESS:** Keyed.

13 **BY MR. WAGNER:**

14 **Q.** "Keyed for pay for layover in the cab of truck but was  
15 found that he did not stay in" -- what's that? "Truck" what?  
16 "Truck all day"?

17 **A.** That day. It looks like "that day."

18 **Q.** "That day." Okay.

19 So the layover policy requires the driver to take the  
20 layover in the cab unless they get authority to take it outside  
21 of the truck; correct?

22 **A.** No. Well, then, he was -- why he was fired for taking his  
23 layover outside the truck if he didn't need permission to take  
24 it outside of the truck?

25 **MR. EDELMAN:** Objection. Misstates the evidence.

**PARRISH - FURTHER REDIRECT / WAGNER**

1           **MR. WAGNER:** No, it doesn't.

2           **THE COURT:** That's overruled.

3           You may answer the question.

4           **THE WITNESS:** He was terminated because he did not log  
5           it correctly. He falsified his record.

6           **BY MR. WAGNER:**

7           **Q.** Did you bring that -- do you have that log?

8           **A.** No, I don't have a log. I'm looking at the exit interview  
9           form.

10          **Q.** You didn't bring the log?

11          **A.** No.

12          **Q.** Do you know why?

13          **A.** Do you know why what?

14          **Q.** Why didn't you bring the log to show what he actually  
15          stated that evening?

16          **A.** Sir, I don't --

17                 **MR. EDELMAN:** Excuse me. Excuse me.

18                 **THE COURT:** Objection sustained.

19          **BY MR. WAGNER:**

20          **Q.** Okay. Have you seen the log that says he --

21          **A.** No, I have not.

22          **Q.** Okay. So what we know from this document is that he  
23          didn't ask for permission to take the layover outside of the  
24          truck, and he was found taking the layover outside of the truck  
25          and he was terminated; correct?

**PARRISH - FURTHER RECROSS / EDELMAN**

1     **A.**    He was terminated for whatever the violation was at that  
2     time.  They would have talked with him and would have  
3     understood the details.  I don't understand the details.

4             **MR. WAGNER:**  Okay.  Thank you.

5             **MR. EDELMAN:**  Very briefly, Your Honor.

6                             **REBUTTAL EXAMINATION**

7     **BY MR. EDELMAN:**

8     **Q.**    Mr. Parrish, you were asked why you didn't bring the log?

9     **A.**    Yes.

10    **Q.**    Did you have any inkling before you got on the stand that  
11    counsel was going to ask you about Mr. Willie Franklin?

12    **A.**    I had no idea.

13    **Q.**    Did anybody ask you to bring any documents about  
14    Mr. Franklin when you came to court today in?

15    **A.**    No, they did not.

16    **Q.**    So just really quickly, where it says "involuntary  
17    termination" on his form, which box is checked?

18    **A.**    It says "gross misconduct, integrity issue, theft, violent  
19    act, dishonesty, misappropriation of company assets."

20    **Q.**    All right.  And I'm going to put a portion, with the  
21    Court's permission, of Mr. Franklin's testimony from court and  
22    see if it refreshes your recollection as to some of the  
23    questions that were asked by counsel.

24             **THE COURT:**  You may show that to him, not to the jury.

25             **MR. EDELMAN:**  Okay.

**PARRISH - FURTHER RECROSS / EDELMAN**

1           **THE COURT:** And I fear we are getting really redundant  
2 here, but you may show it to him.

3           **MR. EDELMAN:** All right. I think you're right, and I  
4 apologize. I will do this really quickly.

5           Would you read the passage that I've highlighted, please.

6           **THE WITNESS:** (Witness reads document.) Question --

7           **THE COURT:** No. Read it to yourself.

8 **BY MR. EDELMAN:**

9           **Q.** Just read it to yourself just to refresh your recollection  
10 as to what he said.

11           **A.** Yes.

12           **Q.** Does that refresh your recollection --

13           **THE COURT:** You may ask him a direct question.

14 **BY MR. EDELMAN:**

15           **Q.** Okay. Did Mr. Franklin state in court during  
16 cross-examination why he was terminated?

17           **MR. WAGNER:** Objection. The record speaks for itself,  
18 and it's calling for just a reading of the record, so it's  
19 improper.

20           **THE COURT:** Yes. That is the redundancy part we were  
21 thinking about earlier.

22           Sustained. You can do this another way.

23           **MR. EDELMAN:** All right. We are getting good guidance  
24 to let this issue go. I'm going to take this away and call it  
25 a day. Thank you for your testimony.

## PARRISH - FURTHER RECROSS / EDELMAN

1           **THE COURT:** Mr. Wagner?

2           **MR. WAGNER:** We're done.

3           **THE COURT:** Okay. You're excused, sir.

4           It's probably a good time for our afternoon break. So,  
5 ladies and gentleman --

6           **MR. WAGNER:** Your Honor, we could go one step further  
7 than that.

8           **THE COURT:** Oh, yeah? Oh, yeah?

9           **MR. WAGNER:** When I said "we're done," I meant done,  
10 done.

11          **THE COURT:** You mean as -- does the plaintiff rest?

12          **MR. WAGNER:** Right.

13                               (Plaintiffs' rest.)

14          **THE COURT:** Oh, well, in that case, ladies and  
15 gentleman, what that means is that we've now had all the  
16 evidence presented that's going to be presented in the case.  
17 So what happens now is we will excuse you from here and bid you  
18 a really good weekend.

19               Please, be back, I would say, at 10:00 -- 9:00 on Monday  
20 morning. What will happen then is first I will read you a set  
21 of instructions, which will be the rules that you are to apply  
22 when you decide the case. You will also get a written copy of  
23 those to take with you in the jury room so you'll have that.  
24 So I read that.

25               Then it will be the opportunity of counsel to give the

**PROCEEDINGS.**

1 closing arguments, and they will do that, and when they're  
2 finished with that, then you will get the case to deliberate.

3 Once that happens, just by the way, you can set your own  
4 schedule. So you have had to come in at 8:30 every day because  
5 I tell you to and we left at 3:30. When juries are  
6 deliberating, they can set their own schedule. You can come at  
7 the time you feel you should come, you can leave when you feel  
8 like you should leave. You can take breaks when you want to  
9 and you can take lunch when you want to. That will be entirely  
10 up to you once you get the case, but you'll get it, I would  
11 guess, early afternoon on Monday.

12 In the meantime, this is kind of a tricky time because you  
13 have heard all the evidence, but it's really important that you  
14 not make up your minds because you haven't deliberated with one  
15 another about it. You haven't heard the arguments of counsel.  
16 You haven't heard the instructions. So don't make up your  
17 minds. Don't let anybody talk to you about it, don't do any  
18 research, don't go to any websites. But be back, please, at  
19 9:00 on Monday, and we will complete the case then. Thank you.

20 (Proceedings were heard out of presence of the jury:)

21 **THE COURT:** 10:30 tomorrow to discuss instructions.

22 **MR. WAGNER:** Yes.

23 **MR. EDELMAN:** Your Honor, I have one question or one  
24 set of exhibits I would like to offer into evidence, if I can  
25 find them.



## PROCEEDINGS.

1           **THE COURT:** Exhibits?

2           **MR. EDELMAN:** Well, these relate to slides that were  
3 used yesterday during Dr. Franklin's -- during Dr. Walker's  
4 testimony.

5           **THE COURT:** Which were not admitted.

6           **MR. EDELMAN:** Were not admitted. No. I didn't offer  
7 them for admission. I would like to offer them, not all of  
8 them, some of them --

9           **THE COURT:** Have you talked to counsel about this?

10          **MR. EDELMAN:** No, I have not.

11          **THE COURT:** Okay. Because none of their expert slides  
12 are in evidence and none of yours are in evidence.

13          **MR. EDELMAN:** Okay.

14          **THE COURT:** If you feel that it would be helpful to  
15 the jury in its deliberations to have one or two of those  
16 things and you can agree with each other about it, I will be  
17 happy to consider that.

18          **MR. EDELMAN:** Okay.

19          **THE COURT:** But right now they're not in.

20          **MR. EDELMAN:** Okay. We will have that discussion.

21          **THE COURT:** But you should have that discussion.

22          **MR. EDELMAN:** Right. Thank you.

23          **THE COURT:** Because, of course, only the things that  
24 are in evidence are going to go back to the jury room.

25          **MR. SALTZMAN:** One additional housekeeping timing

## PROCEEDINGS.

1 issue. I believe sometime this morning while we were here,  
2 there was an upload by defendant of motions -- maybe a 50(a)  
3 motion?

4 **MR. EDELMAN:** Yes. I believe so.

5 **THE COURT:** A motion for directed verdict?

6 **MR. EDELMAN:** Yes.

7 **MR. WAGNER:** Your Honor, we will be filing a motion  
8 for directed verdict tomorrow, I believe.

9 **MR. SALTZMAN:** I guess we want to talk about timing of  
10 that since it was uploaded this morning while we were all here,  
11 and I think they have it set for tomorrow morning. It will be  
12 a little difficult to be doing written responses tonight --

13 **THE COURT:** You need not file a written response by  
14 tomorrow morning. I will consider carefully everything you  
15 have written, but I would be very surprised if we didn't at  
16 least let the jury decide the case, and then if need be, he  
17 will make decisions at that point. I think it's unlikely I  
18 would grant anything, and it is more likely that I would deny  
19 things without prejudice to rethinking afterwards. But you  
20 can --

21 **MR. SALTZMAN:** Tonight's homework?

22 **THE COURT:** I would say focus on the instructions  
23 rather than motions, is what I would say.

24 **MR. SALTZMAN:** We will take that direction. Thank  
25 you, Your Honor.

**PROCEEDINGS.**

(Proceedings adjourned at 1:59 p.m.)

PROCEEDINGS.

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Thursday, November 17, 2016

*Pamela A. Batalo*

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Pamela A. Batalo, CSR No. 3593, RMR, FCRR  
U.S. Court Reporter